

10-2008

# A Summary of the Activities of the Maine Indian Tribal-State Commission. July 1, 2007 – June 30, 2008

Maine Indian Tribal-State Commission

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# **A Summary of the Activities of the Maine Indian Tribal-State Commission (July 1, 2007 – June 30, 2008)**



*Prepared by*

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## **Table of Contents**

	<b><u>Page</u></b>
<b>I. Executive Summary</b>	<b>i</b>
<b>II. Introduction</b>	<b>1</b>
A. Purpose and Organization of This Report	
<b>III. Overview of MITSC</b>	<b>1</b>
A. Purpose and Responsibilities	
B. MITSC Members	
C. Meetings and Other Events	
D. Governmental Outreach	
E. Media Outreach	
F. Religious and Non-Governmental Organization (NGO) Outreach	
G. Funding	
<b>IV. Unilateralism Jeopardizes 1980 Agreement</b>	<b>6</b>
A. State of Maine Interpretation and Implementation of the Settlement Agreement	
B. Tribal Reaction to State Actions	
C. Consequences of Unilateralism	
D. Steps to Replace Unilateralism with Collective Action	
<b>V. Assessment of MITSC Implementation of Fiscal Year 2008     (July 1, 2007 – June 30, 2008) Work Plan</b>	<b>18</b>
A. Provide Administrative and Staff Support to Tribal-State Work Group to Study Issues Associated with the Maine Implementing Act and Related Issues	
B. Assist Wabanaki, State of Maine and Other Leaders to Make a Decision on Whether to Pursue Hosting a Campus in Maine as Part of a Multi-Tribal College to Serve Tribes Residing East of the Mississippi River	
C. Spur Effective Implementation of LD 291, An Act to Require Teaching of Maine Native American History and Culture in Maine's Schools	
D. Support Wabanaki/Bates, Bowdoin, and Colby Colleges Collaboration	
E. Strengthen University of Maine System and Individual Campus Programs Intended to Serve Wabanaki Students	
F. Promote Economic Development Cooperation Between the Wabanaki and State of Maine	
G. Support Work Between the Passamaquoddy Criminal Justice Commission and the Department of Corrections to Address Barriers Experienced by Wabanaki Inmates Attempting to Practice Their Religion	
H. Monitor State Observance of Sustenance Fishing Rights Guaranteed to the Passamaquoddy Tribe and Penobscot Nation under 30 MRSA §6207(4)	

- I. Consider Holding a Summer 2008 Fisheries Workshop
- J. Establish Strong Presence on Any Bills Supported or Opposed by MITSC and Monitor Other Legislation Potentially Affecting Tribal-State Interests during 2nd Session of the 123<sup>rd</sup> Maine Legislature
- K. Continue Wabanaki Leaders Meetings and Outreach and Communication to Tribal Leadership
- L. Continue Outreach and Communications to Executive and Legislative Branches of State Government Including Briefing to State Senate, Possible Legislative Tour of Indian Island
- M. Provide Logistical Support and Staffing for 2008 Assembly of Governors and Chiefs
- N. Support the Penobscot River Restoration Project

## **VI. Other MITSC Activities**

**35**

- A. Ensure Full Implementation of Maine's Offensive Place Names Law
- B. Publicity for *Wabanaki: A New Dawn*

## **Appendices**

- I. Final Report of the Tribal-State Work Group Created by Resolve 2007, Chapter 142, 123<sup>rd</sup> Maine Legislature Resolve, To Continue the Tribal-State Work Group
- II. Remarks of Paul Bisulca, Paul Thibeault, and John Dieffenbacher-Krall Briefing of the Maine Legislature on the Maine Indian Claims Settlement Act, Maine Implementing Act, Maine Indian-Tribal State Commission, and Current Tribal-State Relations, January 17, 2008
- III. Testimony to the Joint Standing Committee on Marine Resources On LD 1957, An Act To Restore Diadromous Fish in the St. Croix River March 3, 2008
- IV. Testimony of John Dieffenbacher-Krall, Executive Director, Maine Indian Tribal-State Commission (MITSC), Concerning LD 2221, An Act To Implement the Recommendations of the Tribal-State Work Group (TSWG) March 11, 2008
- V. Maine Indian Tribal-State Commission Comments on the Scoping Process for the Penobscot River Restoration Project and the Publication, *Penobscot River Restoration Trust Scoping Document for the Veazie, Great Works and Howland Projects (FERC Project Nos. 2403, 2312 & 2721)* 12/18/07
- VI. Wabanaki-Bates-Bowdoin-Colby Collaborative 2007-2008 Report Summary
- VII. Report Sweat Lodge Ceremony at Maine State Prison September 27, 2008

## I. Executive Summary

Tribal-state relations, after experiencing a positive two-year trend of improvement, precipitously plummeted in April 2008. Though specific individuals and their actions caused a rupture in tribal-state relations in the early spring of 2008, these developments occurred in the context of a negative longer term trend of unilateralism. Both the State of Maine and the Tribes too often act unilaterally though the State does so from a position of political, legal, and economic advantage while the Tribes revert to unilateral action from exasperation that they cannot resolve their disputes with the State in what they believe to be a just manner.

One of the most important achievements of the Maine Indian Claims Settlement was the establishment of a government-to-government relationship between equals. Former Maine Attorney General Richard Cohen testified to the US Senate Select Committee on Indian Affairs in the summer of 1980, “I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine.” Tom Tureen, the lawyer who represented the Passamaquoddy Tribe and Penobscot Nation in the negotiations with the State, said at the same hearing, “I would agree with what Dick Cohen said earlier – that the negotiations in this case all around were characterized by a mutual respect and were carried on in a commendable atmosphere.”

Perhaps the greatest casualty in the decades-long deterioration in tribal-state relations is the withering of the deep-seated mutual respect between the parties that Richard Cohen and Tom Tureen describe at the conclusion of the Settlement Act negotiations. Tribal leaders view the current Wabanaki-State relationship as broken. Maine political leaders claim for the most part that they don’t truly understand why the events of the late winter/early spring of 2008 caused such an abrupt rupture in tribal-state relations.

In order to fix the broken relationship, the Maine Indian Tribal-State Commission (MITSC) believes that the signatories must return to jointly determining their future. At the same Senate Select Committee on Indian Affairs referenced earlier, Attorney General Cohen warned, “I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different.” Though he was referring to the land claim itself, Richard Cohen’s words accurately describe the current situation. The litigation that has ensued since the adoption of the agreement involving its interpretation and application has degraded the relationship into one of suspicion and distrust.

MITSC recommends four specific actions to restoring a sense of trust and mutual recognition for each signatory’s sovereignty. Our recommendations include:

**1. Adopt a new budget process for determining the signatories’ financial support for MITSC.** Maine originally agreed to fund 100% of MITSC operations. Maine escaped its legal obligation to fund MITSC operations when the parties agreed the amount specified in MIA,

\$3,000, was insufficient and the specific amount was dropped from the Act. An initial Tribal offer in 1984 to contribute toward MITSC operations has become a State expectation of Tribal cost sharing. Yet the Tribes, equals with the State under the Settlement Act, have had no real input into MITSC's funding as the Maine Legislature has determined what MITSC will receive for State funding. The Tribes have picked up the shortfall of what the State has determined it is willing to give. The parties should adopt a process that determines the amount of funding MITSC will receive based on what the parties mutually agree MITSC should do in the coming years. Ideally, this would occur at the Annual Assembly of Governors and Chiefs. In order for this new process to work, the discussion of the MITSC work plan, its overall funding, and how much each signatory would pay needs to occur at a predictable date which respects the different budget processes for the respective governments.

**2. Enact in the 1<sup>st</sup> session of the 124<sup>th</sup> Legislature (2009) the Tribal-State Work Group (TSWG) recommendations that reinforce consultation and joint problem solving.** Three of the eight unanimously endorsed TSWG recommendations especially address decision making. The second recommendation suggests adding the Houlton Band of Maliseet Indians to MITSC. Twice, attempts to add the Maliseets to MITSC have failed though all the signatories have recognized the Maliseets as members of MITSC since September 2007. Governor Baldacci and legislative leaders must resolve concerns expressed by the Attorney General's staff about the TSWG third recommendation to institute mandatory mediation before the State or the Tribes could initiate litigation against one another concerning disputes involving the Settlement Act. All the parties assembled at the 2006 Assembly of Governors and Chiefs bemoaned the many costs of litigation. MITSC sees no reason that legislative language acceptable to all of the parties can't be drafted. Finally, passage of the fourth TSWG recommendation, to require mandatory meaningful consultation with the Tribes prior to any legislative, policy, or rule change, should occur. A model for such a policy is Executive Order 13175 adopted by President Clinton governing Federal Government actions. The idea is for Maine to do something similar.

**3. Develop a permanent process for orienting new and returning legislators about the Maine Indian Claims Settlement Act (MICA), MIA, the Wabanaki, and tribal-state relations.** A component of the envisioned legislator orientation should include visits to one or more Wabanaki communities.

**4. Accelerate implementation of LD 291.** Maine Public Law 2001, Chapter 403 (LD 291, An Act to Require Teaching of Maine Native American History and Culture in Maine's Schools) requires teaching in Maine public schools grades K-12 about Maine Wabanaki governments; Maine Wabanaki cultural systems; Maine Wabanaki territories; and Maine Wabanaki economic systems. Though successful implementation of this law will not immediately impact the government-to-government policy discussions of the signatories, over time it can greatly enhance the non-Indian population's knowledge and understanding of the Wabanaki. Implementation of LD 291 has suffered because of the lack of a specific point person within the Department of Education (DOE) to oversee the law's implementation. Commissioner Gendron has assigned the DOE Social Studies Specialist with responsibility for LD 291 implementation. Maine State Government must avoid cutting that position as it considers budget reductions for this fiscal year and in the upcoming biennium.

## **II. Introduction**

### **A. Purpose and Organization of This Report**

This report summarizes MITSC's work from July 1, 2007 to June 30, 2008. MITSC's bylaws specify an annual report will be transmitted to the State, the Penobscot Nation, and the Passamaquoddy Tribe at the close of each year. MITSC issued its last annual report in August 2007. It covered a 12 month period from July 1, 2006 to June 30, 2007.

*Section III* of this report entails an overview of MITSC and outreach it performed to governments, the media, religious community, and non-governmental organizations (NGOs). *Section IV* describes the condition of Tribal-State relations and challenges confronting MITSC. *Section V* explains MITSC's activities implementing its 2007-2008 work plan. *Section VI* discusses other significant MITSC work undertaken in 2007-2008 outside of the work plan. When the term "Tribes" is used in this report, it refers to the Passamaquoddy Tribe and Penobscot Nation, unless the context indicates otherwise.

## **III. Overview of MITSC**

### **A. Purpose and Responsibilities**

MITSC is an inter-governmental entity created by An Act to Implement the Maine Indian Claims Settlement (known hereafter as the Maine Implementing Act (30 MRSA §6201 - §6214)). The Maine Implementing Act (MIA) directs MITSC to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State and shall make such reports and recommendations to the Legislature, the Passamaquoddy Tribe and the Penobscot Nation as it determines appropriate."

The Act specifies additional responsibilities for MITSC:

- Land Acquisition. Make recommendations about the acquisition of certain lands to be included in Indian Territory.
- Fishing Rules. Promulgate fishing rules for certain ponds, rivers, and streams adjacent to or within Indian Territory.
- Studies. Make recommendations about fish and wildlife management policies on non-Indian lands to protect fish and wildlife stocks on lands and waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Indian Nation, or MITSC.
- Extended Reservations. Review petitions by the Tribes for designation as an "extended reservation."

MITSC also performs an informal information and referral function for people looking for information about the Settlement, the Wabanaki, Tribal enrollment, State of Maine Tuition

Waiver Program, and tribal-state relations. It also provides to the Executive and Legislative Branches of State Government staff support pertaining to Indian-related legislation and other Indian matters.

## **B. MITSC Members**

MITSC unofficially operates with eleven members, including four appointed by the State of Maine, two by the Houlton Band of Maliseet Indians, two by the Passamaquoddy Tribe, and two by the Penobscot Nation. The eleventh member is the chair, who is selected by the ten appointees. Seven members constitute a quorum.

MITSC unofficially operates with eleven members because of two successive failures to amend MIA to create two seats for the Maliseets and two corresponding seats for the State. In 2007, all the signatories to MIA supported LD 373, An Act To Change the Membership of the Maine Indian Tribal-State Commission To Add Seats for the Houlton Band of Maliseet Indians and the State. The Maine Legislature enacted LD 373 in May 2007 and Governor Baldacci signed the bill into law May 22, 2007. As required under MIA, the Houlton Band of Maliseet Indians and the Passamaquoddy Tribe also approved the change. However, the Penobscot Nation did not submit its approval within the specified timeframe.

Earlier this year a second effort was made to add the Maliseets to MITSC and create two additional seats for the State. The second attempt became part of the Tribal-State Work Group bill, LD 2221, An Act To Implement the Recommendations of the Tribal-State Work Group. The State approved LD 2221 in April 2008 but the bill was rejected by the Maliseets, Passamaquoddies, and Penobscots.

All the signatories continue to support the addition of the Houlton Band of Maliseet Indians to MITSC. MITSC will work with the signatories to MIA to determine the best approach for making the addition of the Maliseets to MITSC official in 2009. Chief Brenda Commander has named Tribal Council Member Linda Raymond and Tribal Administrator Brian Reynolds to serve as the Maliseet MITSC Commissioners.

## **C. Meetings and Other Events**

From July 1, 2007 through June 30, 2008, MITSC held 8 meetings, including three in Augusta, one at the Passamaquoddy Reservation at Motahkmikuk (Indian Township), one at the Passamaquoddy Reservation at Sipayik (Pleasant Point), a short session following the July 19, 2007 Assembly of Governors and Chiefs held at the Veazie Salmon Club, one in Bangor, and one conference call.

MITSC was honored to attend a gathering of the Wabanaki Confederacy hosted by the Penobscot Nation June 21-27, 2008. The Wabanaki Confederacy originally formed in the late 17<sup>th</sup> century, disbanded in 1862, and reformed in 1993 with a gathering hosted by the Penobscot Nation. The original Wabanaki Confederacy consisted of the Abenaki, Maliseets, Micmacs, Passamaquoddies, and Penobscots. Nearly 40 chiefs from throughout the northeastern US and



eastern Canada attended the June 2008 event. MITSC made a formal presentation to the Wabanaki Confederacy on June 25 discussing the condition of tribal-state relations in Maine.

MITSC Chair Paul Bisulca represented MITSC at the official opening of the Maliseet Technology Learning Center held April 24, 2008. The Technology Learning Center, backed by IBM, SeniorNet, the Native American Chamber of Commerce and the U.S. Department of the Interior Office of Indian Energy and Economic Development, offers computer access and educational opportunities to Maliseet youth and tribal elders. The Maliseet Center is the fourth opened under the grant program and first in the Northeast.

#### **D. Governmental Outreach**

MITSC views regular and substantive communications with all four signatories to MIA as essential to fulfilling its responsibilities under 30 MRSA §6212. MITSC Executive Director John Dieffenbacher-Krall regularly emails Wabanaki and State leaders news articles and other updates covering topics that could potentially or do impact tribal-state relations. From August 2007 until April 2008, the MITSC Executive Director staffed the Tribal-State Work Group on behalf of the State of Maine.

The MITSC Chair and the Executive Director strive to meet with Wabanaki and State Leaders whenever the situation in MITSC's judgment would benefit from face-to-face discussion. MITSC also keeps a number of staff employed by the Tribes and the State informed of important tribal-state developments. MITSC maintains a policy of meeting with any official representative of any of the signatories whenever requested. MITSC finds that the Wabanaki far more regularly seek consultation with MITSC as compared to the State.

MITSC continued to travel around the State to meet with Tribal and Maine leaders. MITSC also helped convene three Wabanaki Leaders meetings on October 23 and November 29, 2007 and March 14, 2008. MITSC Chair Paul Bisulca considers the Wabanaki Leaders meetings to be highly valuable forums at which he can communicate with the chiefs, hear their individual and collective concerns, and then articulate Tribal leaders' concerns to other Maine leaders.

In addition, MITSC attended Wabanaki meetings held September 14, 2007 and March 7, 2008 concerning the Tribal State Work Group process and the bill which emerged from that process, LD 2221. On June 25, 2008, MITSC Chair Paul Bisulca addressed a mid-week session of the Wabanaki Confederacy attended by Tribes from throughout the northeastern US and eastern Canada.

Besides the collective Wabanaki meetings that MITSC attended, the Commission also met with individual Wabanaki Tribes. MITSC met with Chief Kirk Francis and a number of Penobscot Nation representatives on August 13, 2007 to assist the Penobscot Nation with the then upcoming Tribal-State Work Group process. MITSC traveled to Presque Isle on February 6, 2008 to meet with the Aroostook Band of Micmacs Chief Victoria Higgins and the Micmac Tribal Council in connection to LD 2221. At the request of the Houlton Band of Maliseet

Indians, MITSC made presentations concerning LD 2221 to people gathered at the Maliseet Gym on May 22 and June 22, 2008.

MITSC met with both executive and legislative leadership and staff for the State of Maine during the period covered by this report. Paul Bisulca met with Governor Baldacci on November 13, 2007. The MITSC Chair and Executive Director participated in joint meetings with both Senate President Beth Edmonds and Speaker Glenn Cummings on October 10, 2007 and February 11, 2008. House Judiciary Committee Chair Deborah Simpson also participated in the February 11, 2008 meeting. On May 21, 2008, MITSC Commissioners Paul Bisulca, Greg Cunningham, and Mike Hastings along with Executive Director John Dieffenbacher-Krall met with Governor Baldacci, President Edmonds, and Speaker Cummings along with their top staff. As a follow-up to the May 21 meeting, John Dieffenbacher-Krall met on June 19, 2008 with Bill Brown and Toby McGrath of the Speaker's staff, Rick McCarthy, Chief of Staff for President Edmonds, and Mike Mahoney, Chief Legal Counsel for Governor Baldacci. MITSC thanks Jamie Waterbury in the Governor's Office, Marcia Homstead in the President's Office, and Jane Figoli in the Speaker's Office for their assistance in scheduling meetings and keeping their respective leaders and fellow staff informed of tribal-state related matters.

One of the signatories to the Maine Indian Claims Settlement Act (MICA) is the United States. Yet despite the US' interest and obligation to ensure effective implementation of MICA, historically little executive and legislative contact has occurred between MITSC (created under the Maine Implementing Act) and these two branches of the Federal Government. However, the respective members of the Maine Congressional delegation and their staff interact with the Wabanaki Tribal Governments on a regular basis. US Senator Olympia Snowe and her staff have played an active role in attempting to resolve the disputed Aroostook Band of Micmacs election which took place in May 2007. MITSC has exchanged information with Senator Snowe's staff and met with Gail Kelly, State Director for Senator Snowe, on January 28, 2008.

## **E. Media Outreach**

As part of increasing its political relevance and effectiveness and to enhance public understanding of tribal-state relations, MITSC has actively worked to raise its public profile. Reporters and editorial writers regularly receive updates from MITSC concerning important developments affecting tribal-state relations and/or news affecting one or more of the Wabanaki Tribes. Besides the six editorial board meetings and four individual reporter briefings that MITSC conducted during the year, it also organized a media tour. The media tour took place on May 20, 2008 at Indian Island. Participants included Tom Groening and Eric Russell from the Bangor Daily News, Robert Long from the Times Record, Tony Ronzio from the Sun Journal, and Christopher St. John, host of the cable TV program State of the State. MITSC organized the tour because of our awareness that many media people writing about the Wabanaki have never visited any of the Wabanaki Reservations. MITSC believed exposing reporters to an actual Wabanaki Reservation would provide them with a more informed perspective on tribal-state issues.

## **F. Religious and Non-Governmental Organization (NGO) Outreach**

MITSC knows that Tribal and State decision makers respond to the demands of their constituents. Tribal-state relations can easily languish as political leaders devote their attention to other issues. Ideally, Tribal and State decision makers would afford MITSC sufficient deference so they would seriously consider any issue the Commission brought to their attention. Unfortunately, MITSC still has considerable work to do to gain the institutional stature it was intended to have under MIA. For instances when MITSC solely speaking to an issue appears to have insufficient impact on the relevant decision makers, we encourage both Tribal and State constituents to contact their governmental leaders.

Besides ongoing relationships with the Friends Committee on Maine Public Policy, a Quaker group, and the Episcopal Committee on Indian Relations, MITSC strengthened its relationship with other religious and nonprofit organizations. On September 21, 2007, Paul Bisulca and John Dieffenbacher-Krall addressed a Maine Council of Churches (MCC) board meeting to encourage the group to become involved with the Tribal-State Work Group process. The Maine Council of Churches includes nine member denominations plus seven associate members with a mission to inspire congregations and persons of faith to unite in good works that build a culture of justice, compassion and peace. MCC did testify in support of the TSWG process. The organization also cited its work with MITSC in its Spring 2008 newsletter.

Paul Bisulca spoke at the Maine People's Alliance (MPA) annual meeting held December 1, 2007. MPA, a statewide membership organization committed to involving un/underrepresented people in our democracy, has over 32,000 members. MPA testified in support of LD 2221 and took an active interest in the bill throughout the legislative session.

Following the conclusion of the legislative session, John Dieffenbacher-Krall met with the Southern Aroostook Ministerial Association (SAMA). Individual members of SAMA attended the April 1, 2008 meeting that occurred between the Maliseets and representatives of the Towns of Houlton, Littleton, and Monticello held at the Maliseet Gym. MITSC appealed to SAMA to take an active role in encouraging the southern Aroostook towns with Maliseet land within their borders to treat the Houlton Band of Maliseet Indians fairly. In a May 2008 letter to the town managers of Houlton, Littleton, and Monticello, the Rev. Arthur Myers, in his capacity as SAMA Chair, wrote, "Our hope is for mutual dignity, respect and trying to walk a mile in the other's shoes." In an extremely positive development, the Houlton Town Council wrote to Chief Commander on July 15, 2008 stating, "The Houlton town council recognizes the desire of the Houlton Band of Maliseet Indian's to achieve greater governmental autonomy, and supports this goal."

## **G. Funding**

MITSC finished fiscal year (FY) 2008 (July 1, 2007 to June 30, 2008) with a balance of \$11,020 comprising a balance of \$1,075 for FY 08 and a carry-over of \$9,945 from FY 07. During the 2008 fiscal year, MITSC took in \$105,639 and spent \$104,564. The previous fiscal year (July 1, 2006 to June 30, 2007), MITSC received \$82,904 and spent \$75,762 for a balance of \$7,142.

Without notice to MITSC or the Wabanaki Tribes, the Judiciary Committee recommended cutting the MITSC budget by \$38,000 in FY 2009 during its March 2008 deliberations concerning the supplemental budget. MITSC discovered this recommendation was adopted after Governor Baldacci had signed the supplemental budget bill, LD 2173, An Act To Make Supplemental Appropriations and Allocations for the Expenditures of State Government and To Change Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2008 and June 30, 2009. MITSC wrote to Governor Baldacci, Senate President Edmonds, and House Speaker Cummings on April 14, 2008 requesting restoration of the cut. Governor Baldacci signed financial orders June 26, 2008 and June 30, 2008 restoring the \$38,000 to the MITSC budget for FY 2009. MITSC still faces a significant shortfall in its FY 2009 budget as this report was written due to the refusal of the Penobscot Nation and Houlton Band of Maliseet Indians and unclear intentions of the Passamaquoddy Tribe to provide any additional voluntary financial support for MITSC operations.

#### **IV. Unilateralism Jeopardizes 1980 Settlement Agreement**

##### **A. State of Maine Interpretation and Implementation of the Settlement Agreement**

Since its inception as a state in 1820, much of the State of Maine's interactions with the Wabanaki have consisted of unilateral actions without the consent and often even awareness of the Wabanaki regarding what the State intended to do. The Maine Indian Claims Settlement Agreement changed that historic pattern with the State of Maine, Passamaquoddy Tribe, Penobscot Nation, and, in its final stages, the Houlton Band of Maliseet Indians sitting down as equals to negotiate an agreement satisfactory to all parties. When the negotiations concluded in 1980, the negotiators who had been most involved in the years-long discussions expected a new era of tribal-state relations to ensue.

I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine. I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different. I cannot put a price tag on human relationships, nor am I suggesting that this factor alone justifies enactment of the legislation before you. I am asking only that you give appropriate consideration to the historical significance not only of the settlement itself, but also of the manner in which it was reached. *Maine Attorney General Richard Cohen, Hearings Before the Select Committee on Indian Affairs, United States Senate On S. 2829, July 1 & 2, 1980, p. 164.*

I would agree with what Dick Cohen said earlier – that the negotiations in this case all around were characterized by a mutual respect and were carried on in a

commendable atmosphere. It was not always harmonious, but commendable. ... You should understand that Indian tribes are inherently conservative. They are very concerned about their futures. They are very concerned about the long view. ...The general body of Federal Indian law is excluded in part because that was the position that the State held to in the negotiations. It was the State's view that the destiny of the Maine tribes as much as possible in the future should be worked out between the State and the tribes. *Tom Tureen, attorney for the Passamaquoddy Tribe & Penobscot Nation, Hearings Before the Select Committee on Indian Affairs, United States Senate On S. 2829, July 1 & 2, 1980, pp. 181-182.*

Unfortunately, the new era of tribal-state relations anticipated by Attorney General Cohen and Tom Tureen quickly faded. The most destructive force undermining the atmosphere of respect and understanding achieved at the conclusion of the settlement negotiations is the signatories' predisposition for unilateral action without taking into consideration the views and needs of the other parties. MITSC's ability to fulfill its role as delineated in MIA and as envisioned by the agreement's negotiators has also suffered due to this tendency for unilateral action instead of mutual resolution of differences, ideally through MITSC. MITSC could cite many examples of this disposition for unilateral action by the parties to the Settlement Act. A few of the more recent examples help to explain the recent deterioration in tribal-state relations.

The parties to the Settlement Act have repeatedly resorted to litigation instead of negotiation to resolve differences in the interpretation of the agreement. Though most of the legal complaints have been filed by the Tribes, they resorted to litigation after unsuccessfully resolving their disputes with the State of Maine out of court. In the process, MITSC has been repeatedly bypassed in various court battles between the Passamaquoddy Tribe, Penobscot Nation, and State of Maine.

When MITSC has offered an opinion concerning the dispute, the parties to the Settlement Act have ignored it. The best example of the signatories ignoring a MITSC opinion regarding a disputed interpretation of MIA arose in the State's effort to gain sole permitting authority under the Clean Water Act. In the midst of that dispute, three paper corporations filed a Freedom of Access Act (FOAA) request seeking documents from the Passamaquoddy Tribe and Penobscot Nation (see *Great Northern Paper Inc. et. al. v. Penobscot Nation*, 2001 ME 68).

In the late 1990s, the State of Maine initiated the process to receive sole permitting authority for wastewater discharge permits, called the National Pollution Discharge Elimination System (NPDES), under the Clean Water Act, a Federal law. The Penobscot Nation and Passamaquoddy Tribe objected to the State assuming sole authority for NPDES fearing Maine's close relationship with regulated polluters that tended to prioritize polluter economic concerns over environmental protection compromised its ability to implement the Clean Water Act. The Tribes also objected claiming the Federal Government could not delegate its trust responsibility for the Tribes' welfare to the State of Maine. Paper corporations and other regulated entities favored the delegation of permitting authority from the Environmental Protection Agency (EPA) to the Maine Department of Environmental Protection (DEP).

After deliberating at several meetings on the issue of whether the Freedom of Access Act applied to the Tribes, MITSC issued a unanimous statement on February 8, 2001. The statement reads in part:

The Maine Indian Tribal-State Commission has considered at great length the decision of Justice Robert E. Crowley which holds that the Maine Freedom of Access Act (FOAA) applies to the Penobscot Nation and the Passamaquoddy Tribe. We unanimously agree that this decision does not reflect our understanding of the Maine Indian Claims Settlement Act and its companion Implementing Act. In general, under the settlement acts, "tribal government" is an internal tribal matter, over which the tribes have sole authority. "Government," by its common meaning, includes the right to set the procedures by which governmental decisions are made. Freedom of information acts are procedural mechanisms that may or may not be adopted by a tribe as part of its system of ruling. Because tribal government is defined by the settlement acts as an internal tribal matter, the State cannot impose its own governmental procedures upon the tribes.

The paper corporations prevailed in the FOAA case. With great reluctance, the Penobscot Nation and Passamaquoddy Tribes submitted the requested documents. Though her comments came five years before the *Penobscot Nation v. Great Northern Paper* decision, State Representative Sharon Treat's observations in 1996 accurately describe what happened with the FOAA request made to the Penobscots and Passamaquoddies.

I am concerned by the actions of the State of Maine through various departments and individuals that appear to align the State with corporate interests over tribal interests, sometimes apparently contradicting the plain meaning or at least the intent of the Settlement Act. Surely, it is not the proper role for the State to use its immense moral and legal authority to help corporations in their disputes with the Tribes. I believe these actions are at the heart of the increasing distrust between the State and the Tribes. Sharon Treat, House Chairperson, Judiciary Committee, 117<sup>th</sup> Legislature, as quoted in *At Loggerheads – The State of Maine and the Wabanaki, Final Report of the Task Force on Tribal-State Relations, 1/15/97*

MITSC did not formally intervene in the *Penobscot Nation v. Great Northern Paper* case. None of the signatories requested us to take such action. Yet as the body empowered to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Passamaquoddy Tribe and the Penobscot Nation and the State" the signatories should have shown deference to the MITSC opinion.

The Maine Judiciary has become an increasingly fractious issue between the Tribes and the State. The Tribes question why legal disputes involving interpretation of MIA often get heard in State Court when Maine is a party to the legal action under consideration. MITSC identified this issue as a significant point of tension in a briefing paper it prepared for the 2006 Assembly of Governors and Chiefs (FRAMEWORK FOR DISCUSSION WABANAKI/STATE OF MAINE LEADERS MEETING Mutual Freedom, Partnership, and Prosperity: The Social, Economic and

Legal Relationship between the Wabanaki Tribes and the State of Maine). Tribal-State Work Group members explored the issue at the December 5, 2007 meeting without developing a proposal for an alternative venue for resolving Tribal-State disputes.

The Maine Executive Branch of State Government's actions in the area of tribal-state relations too often epitomize unilateralism. Executive Branch unilateralism reached such an extreme during the 1990s that the governor at the time refused to even discuss disputed provisions and interpretations of MIA bothering the Tribes. Governor Baldacci created a new opportunity for dialogue and possible resolution of disputed interpretations of MIA when he agreed to discuss such issues at the May 8, 2006 Assembly of Governors and Chiefs. Governor Baldacci has also demonstrated an openness to Wabanaki input on key gubernatorial appointments resulting in Passamaquoddy educator Wayne Newell's appointment to the University of Maine System Board of Trustees and Passamaquoddy Sipayik Criminal Justice Commission Chairperson Denise Altvater's appointment to the Maine State Prison Board of Visitors.

During the period covered by this report, the mindset of unilateralism has especially characterized segments of the Maine Legislature. As the Maine Legislature considered the State of Maine biennial budget for 2008-2009, the Judiciary Committee attempted to unilaterally direct MITSC's work effort. The Judiciary Committee did not support increasing the State's annual assessment to MITSC from \$34,277 to \$72,277 per year despite the backing of the Wabanaki, Governor Baldacci, and legislative leadership. At a March 6, 2007 work session which in part dealt with Governor Baldacci's biennial budget recommendation for MITSC funding, Judiciary Committee members publicly declared MITSC would not require the increased assessment contained in the budget bill if it focused on legal matters under 30 MRSA §6212(3) and deemphasized social and economic issues, which were key elements in ongoing discussions between Tribal and State leaders. Singular control over MITSC's work effort does not comport with the intent of the Settlement Act.

The statements made by Judiciary Committee members prompted Penobscot Nation Chief Kirk Francis to write a March 20, 2007 letter to Governor Baldacci. In the letter, Chief Francis expresses his dismay at the unilateral action taken by the Judiciary Committee. He goes on to state:

The Judiciary Committee is the wrong forum for changing the legal relationship between the signatories to the Settlement Act. Though I recognize they are the Maine Legislature's committee of jurisdiction for these matters, possible changes to the Maine Implementing Act should only be considered with the approval of the top elected leaders of all the signatories working in close consultation with their respective legislative bodies.

Ultimately, the Appropriations and Financial Affairs Committee rejected the Judiciary Committee recommendation to cut the proposed increase for the MITSC budget. Governor Baldacci signed the 2008-2009 biennial budget bill with the proposed increase intact. But the Judiciary Committee continued to make unilateral budget decisions violating the fundamental

principles of consultation and mutual decision making, which are integral to positive tribal-state relations.

Following the adoption of the 2008-2009 biennial budget, Maine State Government experienced revenue receipts below projections necessitating reductions to the previously approved two-year budget. The Maine Budget Office informed MITSC that the Baldacci Administration had proposed reducing MITSC's budget by \$2,547 in the second year of the biennium. Though MITSC would have preferred no reduction in its level of State support, MITSC viewed this cut as reasonable given the reductions being made throughout the State budget. In a phone conversation with Mike Mahoney, then the Governor's staffperson responsible for tribal-state relations, Paul Bisulca agreed to reduce the state assessment by the \$2,547 figure.

Without any notice to the Wabanaki, MITSC, Governor Baldacci's Office, or legislative leadership, the Judiciary Committee recommended rescinding the \$38,000 increase MITSC had received for FY 2009 returning the State contribution to \$34,277. MITSC did not learn of the \$38,000 cut until April 7, a week after Governor Baldacci had signed the supplemental budget bill into law. Strangely, nobody on the Judiciary Committee told MITSC about the cut despite MITSC's extensive contact with them during this period as the Committee considered LD 2221.

MITSC discussed the action taken by the Judiciary Committee at its meeting held April 9, 2008. Commissioners unanimously voted to direct MITSC Chair Paul Bisulca to write to Governor Baldacci and the presiding officers of the Legislature to object to the cut in the MITSC budget and the process used to arrive at the decision. Paul Bisulca wrote to Governor Baldacci, President Edmonds, and Speaker Cummings on April 14, 2008. His letter reads in part, "Unfortunately, this unilateral action of the State of Maine without consultation with the other three parties to the Maine Implementing Act jeopardizes that progress [strengthened tribal-state relations], undermines the collective decision making which governs MITSC's operations, and could be viewed as Maine's unwillingness to support properly the implementation of the Act."

Chiefs Kirk Francis and Brenda Commander also objected to the action taken by the Judiciary Committee. Chief Commander expressed her dismay with the Judiciary Committee's action in an April 23, 2008 letter to Governor Baldacci.

I was shocked to learn that the State of Maine unilaterally acted to cut its financial support of the Maine Indian Tribal-State Commission (MITSC). Perhaps even more startling was the failure to consult with my Tribe and the other Wabanaki Tribes that belong to MITSC...By unilaterally cutting its contribution to MITSC, Maine State Government has effectively decided what level of services MITSC can provide and constrained its operations. This action harms the Houlton Band of Maliseet Indians. The State of Maine does not have the right to do this under the Maine Implementing Act. MITSC is comprised of four sovereign governments. No individual member government should dictate to the other three how MITSC will function.



Chief Francis voiced similar concerns to those articulated by Chief Commander in an April 28, 2008 letter to Governor Baldacci.

I can't communicate the depth of my disgust that the Legislature would cut the MITSC budget by \$38,000 after the extensive work done the last year to increase State financial support to a level more commensurate with MITSC's statutory responsibilities...Any change in the agreed upon support by each sovereign should only occur after formal government-to-government consultation and acceptance by all the parties. One sovereign should never dictate to the other sovereigns the level of funding MITSC will receive and thus unilaterally alter its work plan and organizational capacity to fulfill its statutory obligations.

MITSC sought and eventually scheduled a meeting with the three State leaders addressed in the April 14, 2008 letter concerning the \$38,000 cut to its budget. The meeting took place May 21, 2008. At the meeting, Governor Baldacci stated he would find MITSC some money to keep it in operation until early the next year. Governor Baldacci actually exceeded his verbal commitment made on May 21 by fully restoring the money cut by the Judiciary Committee in two separate financial orders he signed on June 26 and June 30, 2008. As of the publication date of this report, MITSC has received \$72,277 from the State for FY 2009.

## **B. Tribal Reaction to State Actions**

Though MITSC most often observes the State of Maine unilaterally acting in the area of tribal-state relations, the Tribes also resort to unilateral action that undermines tribal-state relations. Two days after the November 4, 2003 election in which voters rejected a Passamaquoddy/Penobscot proposal to operate a casino in Sanford, Maine, Passamaquoddy Pleasant Point MITSC Commissioner Cliv Dore declared during a MITSC meeting that his leaders had decided to stop sending representatives to MITSC until further notice. Wayne Newell, representing the Passamaquoddy Tribe at Indian Township and participating by phone, then left the meeting by hanging up. John Banks and Mark Chavaree, representing the Penobscot Nation, announced they had no directive from their Tribal leaders to withdraw but left the meeting in solidarity with the Passamaquoddy Tribe. For 14 months, MITSC held no official meetings. The departure of the Passamaquoddy and Penobscot Commissioners also contributed to Cushman Anthony resigning as MITSC Chair half way through his second term.

After the failure of several important tribal-state and Wabanaki bills before the Maine Legislature this year, Penobscot Nation Chief Kirk Francis announced he was cutting off relations with the State of Maine. This decision included withdrawing the Penobscot Commissioners on MITSC. The Penobscot Chief's decision means MITSC can only hold meetings with a quorum if every other MITSC Commissioner attends the scheduled meeting. Informally, MITSC will not take action on any issue which may affect the Penobscot Nation, constraining MITSC's activities during the Penobscot Nation's absence from the Commission.

Which sovereign exercises specific powers on discrete lands and waters encompasses many of the disagreements between the Tribes and the State. The Passamaquoddy Tribe at Indian

Township has long asserted that waters such as Big Lake abutting its reservation at Motahkmikuk comprise reservation waters under exclusive Passamaquoddy control. Section 6207(1)(B) gives the Tribes exclusive authority on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres. Waters larger than 10 acres with 50% or more of the linear shoreline in Indian Territory, any section of a river or stream with both sides within Indian Territory, and any section of a river or stream with a continuous segment within Indian Territory of ½ mile or more fall under MITSC jurisdiction. The Passamaquoddy Tribe and Penobscot Nation do possess sustenance fishing rights under 30 MRSA §6207(4), “Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.”

The Passamaquoddy Indian Reservation, defined in 30 MRSA §6203(5), includes Pine Island in Big Lake and 15 islands in the St. Croix River. A reasonable person might infer that Passamaquoddy and Penobscot sustenance fishing rights extend to waters bordering and surrounding their reservation land. Unfortunately, MIA does not clearly address this category of waters.

This issue came to a head in 2000 when the Passamaquoddy Tribe announced it intended to require fishing licenses for the privilege to fish in Big, Lewey, and Long Lakes, Grand Falls Flowage, Berry, Flipper, George, Huntley, Kennebec, and Second Brooks, Tomah Stream, and the St. Croix River. Many Washington County residents reacted angrily to the Passamaquoddy assertion of authority. State legislators from Washington County asked the Attorney General for an opinion on the issue. Deputy Attorney General Paul Stern wrote to Senator Vinton Cassidy on April 13, 2000.

The Indian Claims Settlement Act is quite clear on this point. Title 30 M.R.S.A. §6207(1)(b) limits the Tribe’s exclusive authority regarding fishing to “any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area.”...The water bodies at issue are reported to be greater than 10 acres in size and not completely surrounded by Passamaquoddy shoreline. Therefore, the Passamaquoddy Tribe has no jurisdiction to enact fishing regulations requiring special licenses for non-Indians on such waters.

The issue of Passamaquoddy reservation waters resurfaced this past spring during the Maine Legislature’s consideration of LD 1957, An Act To Restore Diadromous Fish in the St. Croix River. The bill proposed removing barriers to sea-run alewife passage at the Woodland and Grand Falls Dams. Fish passage was created in the 1980s at the dams with barriers resurrected in 1995 after local guides and anglers claimed that sea-run alewives had caused the decline of smallmouth bass, especially in Spednic Lake.

MITSC began discussing this issue at its February 2, 2007 meeting. At nearly every MITSC meeting for the rest of the year, MITSC Chair Paul Bisulca inquired whether the Passamaquoddy

Tribe had taken a position on the restoration of alewife passage in the St. Croix River. Each time the issue was raised Passamaquoddy representatives responded no action had been taken by the Tribe. MITSC again discussed the issue of restoring alewife passage in the St. Croix River at its January 24, 2008 meeting held at Motahkmikuk. Donald Soctomah asked his fellow Commissioners to let him get a response from the Passamaquoddy Tribe before MITSC took a position on the issue. At this point, the State of Maine had requested MITSC support LD 1957. The Maliseets and Penobscots had also declared their support for the bill. When MITSC met on February 5, 2008, Donald Soctomah announced his Tribe still had no position on the bill with Governor Nicholas intending to oppose it and Chief Phillips-Doyle supporting it. MITSC Commissioners voted to support LD 1957 with Passamaquoddy Commissioners Hilda Lewis and Donald Soctomah abstaining from the vote.

Governor Nicholas wrote a memo to Roland Martin, Commissioner of Inland Fisheries and Wildlife (IF&W), dated March 4, 2008. The subject line of Governor Nicholas' memo reads, "Alewives and Passamaquoddy Reservation Waters." Throughout the memo, Governor Nicholas refers to Passamaquoddy Reservation Waters, a term never used in MICA or MIA. Governor Nicholas' opposition to LD 1957 caused the Marine Resources Committee to weaken the bill by only allowing the removal of the barrier at the Woodland Dam.

In MITSC's opinion, the open question regarding authority related to sustenance fishing rights in boundary waters is an example of one of the many gray areas in MIA. Governor Nicholas' and Chief Phillips-Doyle's refusal to engage with MITSC on a possible solution to the Passamaquoddy-State dispute thwarts MITSC's ability to fulfill its mission envisioned by the parties to the agreement. Until the Passamaquoddy Chiefs agree to work toward a solution, the issue of Passamaquoddy sustenance fishing rights in and around their reservation in Indian Township will resurface without resolution.

### **C. Consequences of Unilateralism**

Each time a signatory to MIA acts unilaterally MITSC's ability to fashion a potential resolution that reflects the input and interests of all of the parties to the Act suffers. Ironically, signatories often take unilateral action, especially in the case of the Tribes, because they view MITSC as too weak and unable to persuade the decision makers that matter to implement its recommendations.

The belief that MITSC lacks sufficient stature to execute its responsibilities is not a new issue. Several people interviewed for the 1997 report, *At Loggerheads – The State of Maine and the Wabanaki*, expressed this concern. Deanna Pehrson, Penobscot Nation, comments, "The Commission has had a lack of authority and this is more the issue than its performance." Evan Richert, a former MITSC Commissioner and past Director of the Maine State Planning Office, states in the same report, "Members themselves are dissatisfied with the MITSC...When these big issues come up, everyone end-runs the Commission."

The late Bennett Katz, past MITSC Chair and member of the Maine Senate when MIA was adopted, offers the following insights about MITSC effectiveness in the *At Loggerheads* report:

It is frustrating for the MITSC to walk a line between the State and the Tribes...When the MITSC has tried to intervene, it has been told to mind its own business...To the extent that the Commission is just a paper tiger, the Tribes do not support it. If the Commission gets influential, people at the State House get nervous, especially in light of the influence of private industry.

The current MITSC perceives a great deal of validity today in what its former chair had to say more than a decade ago. Three years ago then Passamaquoddy Tribal Representative Fred Moore introduced a bill, LD 1596, An Act To Abolish the Maine Indian Tribal-State Commission. The introduction of LD 1596 reflected Passamaquoddy and generally Wabanaki frustration with the perceived political ineffectiveness of MITSC. As a condition of standing for election as Chair of MITSC, Paul Bisulca requested the withdrawal of LD 1596 in exchange for his pledge to make MITSC politically relevant. Passamaquoddy Tribal Representative Fred Moore withdrew the bill in the winter of 2006.

Since the withdrawal of LD 1596, MITSC has rebuilt Tribal confidence in it, especially from the Maliseets and Penobscots. In the previously referenced April 23, 2008 letter of Chief Commander to Governor Baldacci, Chief Commander writes about MITSC:

During the short period of time of our membership, we have deeply appreciated the benefits of belonging to MITSC. Too often in the past my Tribe has been unaware of important political developments originating from Maine State Government. MITSC does a superb job of keeping us informed and alerted to proposed policies that could affect the Maliseet People...I was under the impression that all five chief executive leaders of the four member sovereigns strongly supported the recent direction of MITSC and its future agenda.

Chief Francis writes in his April 28, 2008 letter to Governor Baldacci that “I have been extremely pleased with the work of MITSC. MITSC has worked hard to elicit Penobscot Nation concerns and take action when requested.”

Wabanaki confidence in MITSC has allowed us to facilitate periodic Wabanaki Leaders’ meetings, Tribal leadership gatherings at which the respective chiefs and other Wabanaki leaders discuss tribal-state relations and other common concerns. The Wabanaki Leaders’ meetings help the Tribes refine their positions on various issues and enable the MITSC Chair to communicate their concerns knowing that the Wabanaki issue positions he shares come from the highest level of authority within the Tribes. The meetings typically occur at one of the Wabanaki Reservations with the Tribes taking turns hosting them. This scheduling and coordination service provided by MITSC addresses one of the roadblocks to MITSC effectiveness identified in the *At Loggerheads* report, MITSC’s lack of connection to its constituents.

Tribal-State Work Group (TSWG) members identified enhancing MITSC authority as an important component of improving tribal-state relations. MITSC scrupulously avoided making recommendations in this or any other area during the TSWG deliberations as the MITSC Chair felt the signatories to the Settlement Act should have their concerns as the exclusive focus of the

body's work. The TSWG's third recommendation, to have MITSC play a mediating role before any litigation could commence between the State and the Tribes, and the fifth recommendation, to allow MITSC to directly introduce legislation for consideration by the Maine Legislature, addressed the Work Group's members' belief that MITSC needs more authority. These two recommendations, as was the case for the six other TSWG recommendations, received unanimous endorsement.

Despite the unanimous support for the TSWG recommendations to strengthen MITSC authority, the Legislature quickly dropped them once a private lobbyist representing the Maine Pulp and Paper Association (MPPA) voiced opposition to them. Bennett Katz's observations from 1996 seem prophetic. Opposition from the Houlton Water Authority represented by the same private lobbyist for the MPPA also caused the Judiciary Committee to recommend new limits on MITSC's authority to regulate fishing in MITSC waters. Under LD 2221 ultimately rejected by the Maliseets, Passamaquoddies, and Penobscots, a portion of the Meduxnekeag River would have come under MITSC jurisdiction for fishing rules. For the first time in the history of MIA, the Judiciary Committee proposed that any potential fishing rules issued by MITSC in Maliseet Indian Territory would be considered a major substantive rule as defined in Title 5, chapter 375, subchapter 2-A.

#### **D. Steps to Replace Unilateralism with Collective Action**

In order to move away from unilateralism to collective decision making, the signatories must change their mindset. The tendency that the parties have exhibited to act unilaterally must be replaced by habitual consultation with their fellow signatories to the Settlement Act whenever any party considers some action that may affect the other. Any vestiges of the 160-year old State control of the Wabanaki must be purged to achieve a suitable working relationship grounded in respect, mutual recognition of each signatory's sovereignty, and enlightened realization that they will live together in perpetuity.

Beyond the needed attitudinal change, MITSC recommends the adoption of several concrete process and policy initiatives. First, the budget process establishing what MITSC will do with what level of financial resources from each party to the Act must change. Originally, the State of Maine agreed to finance 100% of MITSC's operations. The MIA specified Maine would annually provide \$3,000 taken from the budget of IF&W. Quickly parties to the Settlement recognized that even in 1980 dollars \$3,000 was far too little a sum to adequately support MITSC operations. The \$3,000 figure was deleted from MIA.

In 1984, the Passamaquoddies and Penobscots volunteered to make one-time contributions to support MITSC operations in order for it to achieve sufficient funding to execute its responsibilities. This volunteer offer from the Passamaquoddy Tribe and Penobscot Nation evolved into an expectation from the State that the Wabanaki MITSC members had an obligation to share financial support of MITSC. Though an expectation took root that the signatories would jointly support MITSC, the State has tended to dictate how much MITSC will receive. MITSC has been compelled to participate in the State of Maine budget process as if it is no different than the dozens of other state commissions that receive Maine funding. Depending on what the

Maine Legislature approved for MITSC funding, the Tribes have supplemented that amount without them having meaningful input into the appropriate level of MITSC financial support.

While a practice has evolved of treating MITSC the same as hundreds of other entities that receive State financial support, MITSC has a unique status distinct from other entities receiving State funding. MITSC exists as the result of a legal settlement agreement with the parties to that agreement accepting specific responsibilities. None of the parties to MIA can disregard its responsibilities at its sole discretion without jeopardizing its compliance with the agreement. The Maine Legislature recognized MITSC's unique status when it specifically exempted it from consideration as a State "authority, board, commission, committee, council and similar organization" in 1993 (5 MRSA §12002(1)(G)). The statement of fact for the legislation that exempts MITSC from the requirements of other State commissions and similar entities states, "The [C]ommission is not a state agency, but is a hybrid tribal-state entity." MITSC's independence from State control is also reflected by the fact that it spends money as directed by its 11 Commissioners, not the allotment procedures for state agencies specified in Title 5, Chapter 149.

Reflecting State law and the positions adopted by Chiefs Commander and Francis, MITSC declined to participate in the regular State of Maine budget process for the upcoming biennial budget to emphasize its unique character and the fact that the State of Maine must provide adequate financial support for its operations to remain in compliance with the agreement. John Dieffenbacher-Krall wrote to Ms. Catherine Bonner, Budget Analyst in the State Bureau of Budget, on August 13, 2008, "I can't comply with your request to sign the Budget Guideline Report as to what level of funding the MITSC will receive in FYs 2010 and 2011 as that decision must be made by all of the parties to the Maine Implementing Act (30 MRSA 6201 et. seq.), the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, the Penobscot Indian Nation, and the State of Maine."

MITSC has called for a new budget process for assessing what MITSC should do, how much it will cost, and how to fairly apportion the cost among all the signatories taking into account their respective ability to pay. Since the Tribes began providing voluntary financial support for MITSC operations, they have been paying a far greater percentage of their budgets and on a per-capita basis as compared to the State of Maine. The Task Force on Tribal-State Relations created by the 117<sup>th</sup> Legislature recommended that "State and tribal leaders should discuss and work toward agreement about the level of support for the MITSC and whether or not parity in cost sharing between the State and the Tribes should continue." Tribal representatives interviewed for the Task Force report strongly stated they were paying too much. "In addition, the Tribes are questioning why they should pay the same as the State, given Maine's population of over one million and the Wabanaki population of around 5,500." Clair Sabattis, then Chief of the Houlton Band of Maliseet Indians, states, "If you look at financing the Commission based on the number of Indian and non-Indian taxpayers, the State would cover a much larger portion of the budget."

The most logical forum for establishing MITSC's budget is the Annual Assembly of Governors and Chiefs. For the Annual Assembly to serve as the forum for setting the MITSC budget for the upcoming fiscal year, the signatories to the Settlement Act would need to commit to a fixed time

for holding the Annual Assembly to bring predictability to their respective budget setting processes. The State of Maine operates with a biennial budget process with individual fiscal years running from July 1 to June 30. The Maliseets, Passamaquoddies, and Penobscots operate on an October 1 to September 30 fiscal calendar.

Several TSWG recommendations address strengthening consultation and dispute resolution between the signatories. These recommendations and the other four adopted in January 2008 should receive priority consideration during the initial session of the 124<sup>th</sup> Legislature. Encouragingly, Governor Baldacci has already committed to introducing the TSWG recommendations for consideration by the next Legislature.

The second TSWG recommendation calls for adding the Maliseets to MITSC and granting it the same rights and powers under MIA as provided for the Passamaquoddies and Penobscots. Though the Maliseets already participate in MITSC, legislation is needed to make it official subject to approval by all of the signatories. The third TSWG recommendation suggests requiring mediation by MITSC before the State or Tribes could sue one another concerning disputes involving MIA or MICA. All the parties have emphatically expressed their desire to reduce litigation. Finally, the fourth recommendation requires the State to undertake meaningful consultation with the Wabanaki before adopting any law, policy, or rule that could affect the Tribes. The Wabanaki have expressed their frustration at the many instances State Government takes action that affects the Tribes without consulting them and allowing them to have substantive input into the contemplated action.

MITSC initiated what it hopes will become a permanent feature of educating incoming legislators when it worked with legislative leadership, the Maine Development Foundation, and the Penobscot Nation last legislative session to provide a number of educational opportunities for legislators. Education about MICA, MIA, the Wabanaki, and tribal-state relations should become a fixture of the legislator orientation process every two years. MITSC strongly believes a component of this education should include having legislators visit Wabanaki Reservations with sufficient time allotted for the visits to afford individuals with an opportunity to gain an understanding of the unique culture, history, and government of each Wabanaki Tribe. Ideally, the Maine Development Foundation will continue to work with the Legislative Council and MITSC to ensure visits to one or more Tribal communities takes place during every January bus tour to eastern and northern Maine.

Implementation of LD 291, An Act to Require Teaching of Maine Native American History and Culture in Maine's Schools (Maine Public Law 2001, Chapter 403), needs acceleration. Though enhanced implementation of LD 291 will not immediately impact State decision makers, it can make a substantial difference in the long term. A question posed by a member of the Judiciary Committee during deliberations concerning LD 2221 illustrates the need for LD 291. While the Judiciary Committee considered LD 2221, a committee member asked, what does the term Wabanaki mean? When the Committee assigned the responsibility for reviewing legislation affecting tribal-state relations includes members who do not know which Tribes reside in Maine and the umbrella term for them underscores the need for LD 291.

After years of little progress, the Department of Education has made a significant commitment during 2008 to move LD 291 implementation forward. The University of Maine System under the direction of Vice-Chancellor James Breece has also assumed a more active role. James Breece understands the need to ensure that all teacher training programs run within the University of Maine System adequately prepare teachers to meet the teaching requirements of LD 291.

## **V. Assessment of MITSC Implementation of Fiscal Year 2008 (July 1, 2007 to June 30, 2008) Work Plan**

MITSC adopted 14 work plan objectives for Fiscal Year 2008. The following section constitutes MITSC's assessment of its effectiveness implementing those objectives.

### **A. Provide Administrative and Staff Support to Tribal-State Work Group to Study Issues Associated with the Maine Implementing Act and Related Issues**

MITSC staffed the second round of the Tribal-State Work Group that commenced in August 2007 and effectively concluded with the end of the legislative session in April 2008. The TSWG originated with Governor Baldacci's Executive Order 19 FY 06/07 in July 2006 as an outcome of a discussion which occurred at the Assembly of Governors and Chiefs held May 8, 2006. One of the three recommendations of the initial TSWG called for its continuation as a legislative entity. Representative Richard Blanchard sponsored LD 1263, Resolve, To Continue the Tribal-State Work Group. The Maine Legislature enacted the resolve, and Governor Baldacci signed it into law June 29, 2007.

LD 1263 expanded the legislative membership of the TSWG by adding two additional House members. The Wabanaki gained two additional seats to boost the total membership to 17 people. In addition, Chief Phillips-Doyle of the Passamaquoddy Tribe at Sipayik appointed himself to participate in the TSWG making its final membership 18 people.

The TSWG met five times. It issued a report in January 2008 with eight unanimous recommendations, seven of them suggested legislative items and the final recommendation that the Executive Branch of State Government engage the Wabanaki on unresolved issues related to MIA (see Appendix 1). The seven legislative recommendations became LD 2221, An Act To Implement the Recommendations of the Tribal-State Work Group.

MITSC expected the unanimously backed recommendations of the TSWG to receive legislative support. No individual or party to MITSC's knowledge expressed any concern or opposition to any of the TSWG recommendations prior to the public hearing held by the Judiciary Committee on March 5 and continued on March 11, 2008. MITSC did advise the Governor's Office and legislative leadership to expect opposition from the Maine Pulp and Paper Association. (The MPPA was the first group to testify in opposition to LD 2221). Mike Mahoney, Senate President Edmonds, and Speaker Cummings expressed no particular concern about the anticipated MPPA opposition. Governor Baldacci and both presiding officers of the Maine Legislature indicated strong support for the bill. Two members of the Judiciary Committee, the committee assigned



the responsibility to consider LD 2221 and make a recommendation to the full Legislature, belonged to the TSWG including the House Chair, Representative Deborah Simpson. MITSC and the Wabanaki counted on the legislative members of the TSWG to act as ambassadors for the legislation and fight for its passage.

During the first day of the public hearing on LD 2221, Steven Buck, City Manager for the City of Caribou, testified in opposition to the bill. Mr. Buck alleged that the City of Caribou and other Aroostook County towns with Maliseet or Micmac land within their borders had been excluded from the TSWG. For the record, two Aroostook County legislators served on the TSWG, Representative Richard Cleary (Houlton) and Representative Henry Joy (Island Falls). Later in the hearing Tim Woodcock, a private attorney employed at Eaton Peabody and former staffperson for the US Senate Committee on Indian Affairs, testified in opposition to LD 2221 on behalf of the City of Caribou and Towns of Houlton and Littleton. Mr. Woodcock's testimony in opposition to LD 2221 surprised MITSC as he had testified at the November 20, 2007 meeting of the TSWG to offer his perspectives on MIA and MICSA. In general, Mr. Woodcock had supported the TSWG initiative and offered some valuable insights into the disputed interpretation of the Settlement Act and its original intent (see TSWG Final Report Appendix 6 available at [www.mitsc.org/library.php?do=section&name=Reports](http://www.mitsc.org/library.php?do=section&name=Reports)).

Though originally included as part of LD 2221, Lisa Bennett, an Aroostook Band of Micmacs Tribal Council member, announced during the public hearing that her Tribe wanted to withdraw from the bill. The jurisdictional parity provisions from that point forward would only apply to the Houlton Band of Maliseet Indians. The Micmacs withdrew from the TSWG process due to an internal political struggle resulting from a disputed election held in May 2007.

At the conclusion of the public hearing for LD 2221, the Judiciary Committee directed the Maliseets to work out potential differences regarding the bill with the Towns of Houlton, Littleton, and Monticello. The Maliseets and other Wabanaki Tribes strongly objected to the Judiciary Committee elevating municipalities to the same governmental status as Indian nations. MITSC agreed with the Maliseets that the Aroostook municipalities should communicate their concerns regarding LD 2221 through their state representatives and the Executive Branch of State Government. However, we also told Maliseet Chief Brenda Commander if the Band desired passage of LD 2221 which originally proposed jurisdictional parity for the Maliseets it would need to try to work out an agreement with its Aroostook municipal neighbors.

Nineteen days elapsed before the Maliseets and three Aroostook County towns met. MITSC worried LD 2221 would fail simply by its opponents running out the clock. MITSC encouraged Chief Commander to directly invite the Towns of Houlton and Monticello to meet with the Tribe, bypassing attorney Tim Woodcock who consistently offered reasons why the parties could not meet earlier. MITSC had some trepidation going into the April 1 meeting held at the Maliseet Gym that the parties might sharply disagree and find themselves unable to reach agreement concerning LD 2221. Instead, the April 1 meeting participants acted congenially to each other.

At the April 1 meeting, the Maliseets and town representatives emphasized the importance of their relationship and their desire to support one another. Houlton Town Manager Doug Hazlett

expressed general support for the Maliseets gaining jurisdictional parity with the Passamaquoddies and Penobscots. His principal problem with LD 2221 involved his concern that the Maliseets have ordinances addressing health and public safety issues adopted before the town would relinquish its authority in that area. The Houlton police chief stated a desire for concurrent jurisdiction with the fledgling Maliseet police force that would enable Houlton police to enforce Maliseet laws within the Maliseet Indian Territory in addition to the Maliseet police exercising that authority. Chief Commander agreed to the changes requested by Houlton officials. MITSC left the meeting feeling optimistic that the Maliseets and Aroostook County towns had reconciled their issues without substantially changing LD 2221.

When the Judiciary Committee began holding work sessions on LD 2221, Tim Woodcock raised a seemingly ever growing number of issues and concerns far beyond what his clients expressed during the April 1 meeting at the Maliseet Gym. The MPPA strongly objected to the TSWG recommendations that would strengthen MITSC authority. The Attorney General's Office also raised concerns about the mandatory mediation provision preceding any State or Tribal litigation of each other.

With LD 2221 beginning to unravel and none of the legislative members of the TSWG defending it, the Wabanaki decided they wanted to focus on two of the recommendations, the Passamaquoddy and Penobscot exemption from FOAA and jurisdictional parity for the Maliseets. The Maine Press Association along with the MPPA had expressed opposition to the FOAA exemption for the Passamaquoddies and Penobscots. The two Tribes became subject to FOAA in the eyes of the State of Maine as a result of the *Great Northern Paper v. Penobscot Nation* decision. The Maine Supreme Court based its ruling on the municipal reference in §6206 of MIA that states "the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State." In their decision, the Supreme Court justices reasoned that because the Passamaquoddies and Penobscots have the "duties, obligations, liabilities and limitations of a municipality" they should be subject to the FOAA that applies to municipalities.

Mike Mahoney, testifying on behalf of Governor Baldacci, gave what many observers characterized as tepid testimony in support of LD 2221. Wabanaki Leaders felt stronger support from Governor Baldacci could make the difference on the FOAA exemption. The five Wabanaki chiefs sought a meeting with Governor Baldacci to ask him to make known to the Judiciary Committee his strong support for the FOAA exemption. They met March 24, 2008. During the meeting, Governor Baldacci expressed his support for exempting the Passamaquoddy Tribe and Penobscot Nation from the FOAA and vowed to do what he could to secure its approval.

The Judiciary Committee held a work session the next day to address in part the Tribal FOAA exemption. Mike Mahoney read a letter he had written at the direction of Governor Baldacci. Mike Mahoney's letter reads in part:

Having weighed the competing considerations in this matter, I am comfortable that exempting the Penobscot Nation and the Passamaquoddy Tribe from FOAA will not unduly harm Maine's citizens. Although a portion of the Land Claims Settlement Act likens tribes to "municipalities," tribal governments are not a part of state and local government in the traditional sense. They govern their respective members, each of whom is able to access information about the workings of their tribal government without resort to FOAA. Moreover, as the Committee is aware, Maine's other Indian tribes – the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs – are not likened to "municipalities" under Maine law and, therefore, are already exempt from FOAA. The Passamaquoddy Tribe and the Penobscot Nation, however, enjoy only a limited exemption from FOAA under a 2001 decision of the Maine Law Court.

Given the tribes' unique position in Maine's governmental framework, and the need to treat all of Maine's tribes equally under the law, fully exempting the Penobscot Nation and Passamaquoddy Tribe from FOAA is an equitable concept. Accordingly, on behalf of the Governor, I urge the Committee to recommend its passage to the full Legislature.

Mahoney's appearance before the Judiciary Committee had a positive impact. The Committee took a straw vote in which it approved exempting the Passamaquoddy Tribe and Penobscot Nation by a 9-2 margin. The Wabanaki outlook immediately shifted to one of guarded optimism that finally a body of the Maine Legislature recognized their sovereignty. The FOAA exemption meant more to the Passamaquoddies and Penobscots than simply reversing the 2001 Great Northern Paper v. Penobscot Nation decision. Should the exemption be included in MIA as the Wabanaki wanted, it would be a small but plain acknowledgment of their sovereignty undoing in their eyes some of the misinterpretation and misapplication of the municipal language in §6206 of MIA.

Unfortunately, the positive atmosphere following the March 25, 2008 Judiciary Committee work session quickly dissipated. Judiciary Committee Chairs Senator Barry Hobbins and Representative Deborah Simpson decided that the Committee would only support including the FOAA exemption in the freedom of information act statute, not in the language of MIA. The Tribes insisted that the language be inserted into MIA. Without including the FOAA language in MIA, the Tribes had no interest in the exemption.

The final Judiciary Committee work sessions on LD 2221 focused on achieving jurisdictional parity for the Maliseets. Lobbying from Tim Woodcock, the MPPA, and Houlton Water Authority steadily weakened the attempt to achieve jurisdictional parity for the Maliseets. The Judiciary Committee reported out a bill with important differences between the potential powers that the Maliseets could exercise within a new Maliseet Indian Territory and the authority that the Passamaquoddies and Penobscots had wielded within their respective territories for 28 years.

The most controversial provision of the Judiciary Committee amendments included a requirement for the Maliseets and the Towns of Houlton and Littleton to reach consensus on

some disputed powers before the beginning of the 124<sup>th</sup> Maine Legislature. If the Judiciary Committee judged the Towns of Houlton and Littleton to have bargained in bad faith, the Maliseets would receive the same authority as the Passamaquoddies and Penobscots. However, if the Committee believed the Maliseets were at fault for the parties failing to reach a compromise, they reserved the right to unilaterally amend MIA in the disputed areas without the usual needed approval of the Maliseets. All of the Wabanaki Tribes were outraged at this proposal. Though the Legislature passed and Governor Baldacci signed LD 2221 into law, it failed as the Maliseets, Passamaquoddies, and Penobscots all rejected it.

The bill approved by Maine State Government only included two of the seven unanimously endorsed recommendations of the TSWG. Besides the compromised jurisdictional parity for the Maliseets, the legislation also amended the heading for Title 30 of the Maine Revised Statutes from “municipalities and counties” to “municipalities, counties and federally recognized Indian tribes.” Beyond the failure to pass anything, tribal-state relations have suffered a tremendous setback. LD 2221 represented an important but small first step for the parties to achieve some joint success to create conditions to consider more difficult to resolve issues involving MIA. MITSC believes that the State of Maine underestimated the damage that failing to enact an acceptable version of LD 2221 to all parties would cause to tribal-state relations. MITSC had repeatedly warned top State decision makers and their staffs that failure to reasonably accommodate the Tribes on the issues being brought forward would produce dire consequences. MITSC’s warnings went unheeded.

Since the end of the legislative session, tribal-state relations have greatly deteriorated. Penobscot Nation Chief Kirk Francis announced his Tribe was cutting off relations with the State of Maine. He also announced that the Penobscot Nation was suspending its participation in MITSC. Initially, Chief Phillips-Doyle announced he was also withdrawing from MITSC only to later reverse that position in the summer. The Penobscot Nation and Houlton Band of Maliseets also announced they would not make any future contributions for MITSC operations until the State restored the Commission funding cut by the Judiciary Committee and an equitable budget process for funding MITSC was developed. The Passamaquoddy Tribe has not declared any intention regarding future MITSC financial support.

Meanwhile, three Tribal organizations have denounced Maine’s failure to abide by the terms of the Settlement agreement. On May 8, 2008, the United South and Eastern Tribes (USET) comprised of 25 federally recognized Tribes resolved that:

the USET Board of Directors respectively request that the U.S. Department of Interior be called upon to intercede on behalf of the Wabanaki Tribes, to immediately notify the State of Maine of the Departmental responsibilities in protecting the Wabanaki Tribes from any State legislative or judicial impacts to Tribal governments and that the Secretary shall carry out to the highest degree the trust fiduciary responsibility of the United States in protecting the Wabanaki Tribes; and, be it further

RESOLVED, the Senate Committee on Indian Affairs; the House Interior, Environment and Related Agencies Subcommittee; and, National Indian Organizations shall be notified of this action with supporting legislation if necessary to meet the needs of the Wabanaki Tribes being federally recognized sovereign Tribes having protection, services and benefits as agreed to 28 years ago without interference from any entity; and,

RESOLVED, the USET Board of Directors shall do everything possible to immediately work with the Bush Administration, Congress and future Administrations to implement this resolution to ensure, "What has happened in the past will never happen again" as was a significant part of the Administration and Congressional intent in their agreement with the Wabanaki Tribes of Maine.

The National Congress of American Indians (NCAI) passed a similar resolution to the USET declaration adopted in May 2008. NCAI includes a membership of 250 Tribes committed to securing the rights and benefits to which Indian people are entitled; to enlighten the public toward a better understanding of the Indian people; to preserve rights under Indian treaties or agreements with the United States; and to promote the common welfare of the American Indians and Alaska Natives. The NCAI resolution passed at the 2008 Mid-Year Session held June 1-4, 2008 finds:

WHEREAS, these Tribes and Bands in 1980 and 1991 entered into agreements to resolve the largest land claim in the history of the United States exceeding well over \$25 billion, removing a cloud of ownership of over two-thirds of the entire State of Maine; and

WHEREAS, this agreement with the United States was to protect the Maine Tribes from acculturation and offer protections against this result being imposed by outside entities; and

WHEREAS, Congress explicitly recognized the Wabanaki as separate and apart from the towns and cities of the State of Maine and accepted that the Wabanaki control all internal matters; and...

BE IT FURTHER RESOLVED, that NCAI strongly urges the Governor and Legislature of the State of Maine to recognize the governmental authority of the Wabanaki Tribes and to support amendments to the Maine Implementing Act that will protect the authority of the Wabanaki Tribes to govern their reservations in a manner similar to other federally recognized tribes; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

On June 27, 2008, the Wabanaki Confederacy, a centuries-old alliance of Wabanaki Tribes from the northeastern US and eastern Canada, joined USET and NCAI in calling for action to address problems with MIA and MICSA. The Wabanaki Confederacy resolution states in part:

**WHEREAS**, over the last 28 years, there has been a tendency to drift back to the previous era of suppressive conditions and discriminating practices of the State's Indian Agent days, including the State redefining the Tribes' Sovereignty-Jurisdiction-Internal Tribal Matters; and

**WHEREAS**, misleading elements beyond those negotiated in 1980 have been applied to the Tribes in the State via legislation, courts, and within the application and functions of State-Tribe relations well beyond the scope of the Federal and State Settlement Acts; and,

**WHEREAS**, over these 28 years, the Trust responsibility and relationship of the United States has been amiss, to such an extent that suppressive laws passed by the Congress apply where beneficial laws do not apply; as well as those same conditions within the State; and,

**WHEREAS**, the Tribes are victims of the anti-Indian conditions via the general public, the administration and legislative body within the State as illustrated within the last few years in State-wide and Legislative voting as well as statements made within legislature when attempts to cure this problem were introduced; and, ...

**NOW THEREFORE BE IT RESOLVED**, that the Wabanaki Tribes respectively request that the United Nations Non-Government Organizations, the Human Rights Council, and the Organization Of American States intercede on behalf of the Wabanaki Tribes, to immediately commence Hearings, cause a Study and publish a Report and to notify Canada and the United States of their responsibilities in protecting the Tribes of Maine from State legislative or judicial impacts on Tribal governments and to carry out to the highest degree of trust fiduciary responsibility of Canada and the United States in protecting the Wabanaki Tribes; and, ...

**BE IT FURTHER RESOLVED**, that the Wabanaki Confederacy Council of Chiefs hereby accept the United Nations Declaration of the Rights of Indigenous Peoples, as their governmental foundation in the relationship with Canada and the United States, respectively.

Three respected Indian organizations, one well over 300 years old, all called for action within a span of less than two months to correct the problems in tribal-state relations. Unfortunately, Maine State Government has not responded with the same sense of urgency. MITSC advised top State of Maine leaders as soon as May 2008 to seek a meeting with Wabanaki leadership to improve the badly deteriorated condition of tribal-state relations.

After a considerable amount of pressure with substantial attention in the Maine media and national Indian publications, State of Maine leaders met with MITSC on May 21, 2008. MITSC shared with Governor Baldacci, Senate President Edmonds, and Speaker Cummings our assessment describing why the TSWG recommendations largely failed and discussed possible corrective action. State leaders expressed an interest in having a meeting including top State and Tribal leaders from both the executive and legislative branches of the respective bodies. MITSC carefully reflected on the discussion that took place on May 21 and wrote a June 3, 2008 letter to the principals proposing a meeting similar in design to the one previously outlined.

Following the June 3 MITSC letter to Governor Baldacci, President Edmonds, and Speaker Cummings, John Dieffenbacher-Krall met with top Maine executive and legislative branch staff on June 19, 2008 to discuss how to move forward on rebuilding tribal-state relations. MITSC told staff for the Governor, Senate President, and House Speaker that the Wabanaki wanted to know what the State was prepared to do in terms of concrete actions before they were likely to consent to a meeting. Maine governmental staff cited the difficulty of the State making any commitments due to the pending election and the many changes that would take place in key leadership positions within State Government. MITSC responded that some key people would remain in place, such as Governor Baldacci, and others likely to have positions of authority in the 124<sup>th</sup> Maine Legislature could be engaged now to begin discussions with the caveat no final commitments could be made until after the November 4 election. State staff expressed little enthusiasm for the MITSC suggestion that Maine Government begin determining what it could reasonably expect to do in terms of changes to MIA and other laws in 2009 that might interest the Wabanaki.

As time has passed since the April 2008 meltdown in tribal-state relations, the Wabanaki have grown increasingly resistant to meeting with the State. In MITSC's judgment, the State missed an opportunity to reengage with the Wabanaki back in the spring. With the passage of many months, the task of getting the sides to resume meaningful dialogue about the issues that most concern them has proven increasingly difficult. MITSC has persisted with consistent contact with both the State and the Wabanaki at both the top leadership and staff level. Despite these efforts, we perceive little likelihood for the resumption of meaningful dialogue until after the November 2008 General Election.

**B. Assist Wabanaki, State of Maine and Other Leaders to Make a Decision on Whether to Pursue Hosting a Campus in Maine as Part of a Multi-Tribal College to Serve Tribes Residing East of the Mississippi River**

Governor Baldacci initially raised the idea of whether the Wabanaki wanted to pursue a Tribal College at the May 2006 Assembly of Governors and Chiefs. All five Wabanaki chiefs assembled at the meeting expressed enthusiastic support for a Maine-based Tribal College. MITSC did a number of things to advance the idea and help the Tribes and the State better understand what needed to be done to create a Wabanaki Tribal College. MITSC reported in its last Annual Report, "Progress on developing a Wabanaki Tribal College has effectively stopped

due to the challenge of identifying funding to sustain it. Wabanaki Leaders and Governor Baldacci need to reexamine this initiative absent adequate funding for it to continue.”

At the July 19, 2007 Assembly of Governors and Chiefs, Paul Bisulca reported, “The problem which was identified at the very beginning and continued to impede progress was money. Efforts to secure outside funding support were not successful, and absent funding support, continued expenditure of MITSC resources is not prudent. Effectively, this item is presently not making any forward movement.” A discussion then ensued between the Wabanaki leaders and Governor Baldacci. Governor Baldacci committed to funding a staffperson for an unspecified period of time to advance the Wabanaki Tribal College idea.

MITSC scheduled a meeting with Department of Education Commissioner Susan Gendron to work with her as Governor Baldacci had directed to define what a staffperson coordinating the Wabanaki Tribal College initiative should do, the ideal qualities and experiences of a person filling the position, and a timeline for hiring the person. MITSC, including Paul Bisulca, John Dieffenbacher-Krall, and Commissioner Mike Hastings, met with Commissioner Gendron, Wabanaki Education Task Force Chair Jim Sappier, Office of the Governor staff Mike Mahoney and Pat Ende, and Robert White, Assistant Provost and Dean, Division of Lifelong Learning, University of Maine, on August 10, 2007.

Paul Bisulca briefed Commissioner Gendron about the history of the Wabanaki Tribal College. In response to Governor Baldacci’s pledge to assign a staffperson to coordinate development of the Wabanaki Tribal College, Commissioner Gendron indicated someone already on her staff working on higher education issues would be available. Paul Bisulca, Jim Sappier, and John Dieffenbacher-Krall met with Harry Osgood, Higher Education Specialist, Dept. of Education, on December 5, 2007. MITSC and Jim Sappier quickly ascertained Harry Osgood would not have sufficient time available to successfully coordinate the Wabanaki Tribal College development.

MITSC met with Commissioner Gendron, James Breece, and John Lisnik, Assistant to the Chancellor for Government Relations, University of Maine System, on February 11, 2008 to discuss in part the Wabanaki Tribal College. MITSC shared its belief that a full-time person solely devoted to the coordination and resource development work necessary to the advancement of a Wabanaki Tribal College was integral if the initiative was to have any chance of success. Commissioner Gendron said she could probably identify some money within the Dept. of Education to fund such a position. With funding possibly available, the next challenge involved who could do the job. MITSC stated its conviction that the position required an experienced person, ideally someone with a background in Tribal Colleges. MITSC offered to speak to Dr. Gerald Gipp, President of the American Indian Higher Education Consortium (AIHEC), to determine if he had any potential interest in the position.

MITSC learned that Dr. Gipp planned to retire in the late spring of 2008 potentially making him available as a consultant. Dr. Gipp said he wanted to speak to Wabanaki leaders before making any decision about the consulting position. MITSC arranged for Dr. Gipp to speak to Wabanaki chiefs at a Wabanaki Leaders’ meeting held March 14, 2008. During the conference call, Dr.



Gipp stressed a needs assessment should be conducted to better evaluate the benefits and potential drawbacks of a Wabanaki Tribal College. Paul Bisulca offered to contact Commissioner Gendron to determine if she would fund Dr. Gipp coming to Maine to meet with Wabanaki leaders to conduct a preliminary needs assessment for the Wabanaki Tribal College.

Commissioner Gendron consented to covering Dr. Gipp's travel costs. The meeting between Dr. Gipp and Wabanaki leaders was scheduled for May 13, 2008. During the interval between when the meeting was initially scheduled and when it would have taken place, tribal-state relations precipitously deteriorated with the Penobscot Nation announcing it was cutting off relations with the State of Maine. The condition of tribal-state relations was not conducive to a new Wabanaki-State partnership to create a Tribal College. The meeting was cancelled. All discussions and work related to a Wabanaki Tribal College have ceased, one of the many adverse repercussions resulting from the meltdown in tribal-state relations.

### **C. Spur Effective Implementation of LD 291, An Act To Require Teaching of Maine Native American History and Culture in Maine's Schools**

An Act To Require Teaching of Maine Native American History and Culture in Maine's Schools (LD 291- Maine Public Law 2001, Chapter 403) became law in June 2001. The law created a Maine Native American History and Culture Commission (commonly referred to as the Wabanaki Studies Commission) charged with submitting a report to the Commissioner of Education by September 1, 2003. MITSC staffed the Wabanaki Studies Commission which ended upon the publication of its final report in October 2003. The Wabanaki Studies Commission unofficially continued after its 2003 implied sunset date helping to implement LD 291 and serving as an advisory group to several entities including the Department of Education (DOE).

*The Final Report of the Wabanaki Studies Commission* (see <http://www.mitsc.org/library.php?do=section&name=Reports>) delineates specific action steps for MITSC, the University of Maine System, and the DOE to take to support effective LD 291 implementation. When MITSC began investigating the record concerning LD 291 implementation, it found none of those charged, including the Commission, had fulfilled their responsibilities as recommended by the Wabanaki Studies Commission. Since late in the year 2006, MITSC has worked to get those responsible for LD 291 implementation and oversight to assess the law's success to date and identify those areas requiring improvement.

As MITSC investigated the state of LD 291 implementation, it encountered two principal problems. One involved the institutions responsible for LD 291 implementation and support. Primary responsibility for LD 291 implementation rests with the Dept. of Education. Though the Dept. of Education has provided limited funding and some staff involvement, it had not approached LD 291 with the requisite accountability, prioritization, resources, or urgency to ensure its success. The DOE also suffered from the lack of a single staffperson assigned with LD 291 implementation responsibility. Commissioner Gendron has successfully addressed the staff responsibility problem by assigning Social Studies Specialist Jana Boody, hired in January 2008, to serve as the DOE's primary person on LD 291. MITSC has found Jana Boody to be an

enthusiastic, professional, organized, and skilled person who has greatly invigorated the DOE's work on LD 291.

James Breece, who has intermittently been assigned LD 291 support responsibilities since the law was enacted, has candidly admitted past University of Maine System (UMS) failings and worked to address them. Breece views one of the University of Maine System's primary responsibilities related to LD 291 as teacher training. He has spoken with the deans at all of the UMS colleges that offer teacher training to emphasize the importance of preparing education majors to teach Wabanaki Studies and ensuring appropriate course work becomes part of student teacher preparation. Current UMS initiatives include creation of a Wabanaki Studies Workgroup and identifying faculty expertise in Native American Studies.

MITSC has responded to its responsibilities concerning LD 291 by devoting more time to examining what is happening with the law and working to address identified deficiencies. MITSC made LD 291 oversight an explicit part of its 2007-2008 organizational work plan. Besides holding three meetings with DOE Commissioner Susan Gendron during the report period to discuss in at least part LD 291 implementation, MITSC has also met with faculty and management at the University of Southern Maine, University of Maine at Presque Isle, and raised \$15,000 from the Bureau of Indian Affairs (BIA) to support a Best Practices in LD 291 conference.

In addition to the institutional neglect already identified, LD 291 has also suffered from Indian parochialism. A small number of Wabanaki people in key positions have actively worked to block progress on LD 291 fearing they might lose program influence and/or personal economic opportunities. MITSC has addressed this reality by discussing the issue at the highest level of Tribal leadership to achieve a consensus from the Wabanaki chiefs on how to proceed to advance LD 291. This included holding a meeting with Maliseet Chief Brenda Commander, Jana Boody, and MITSC on July 10, 2008 to discuss how to ensure Maliseet representation within an overall Wabanaki Studies curriculum. MITSC believes that the Wabanaki chiefs support MITSC's current work to address problems undermining LD 291's effectiveness.

The DOE has developed a three-part plan to boost LD 291 implementation. First, DOE wants to develop grade-specific benchmarks that will serve as minimum standards of what Maine school children should know about Maine tribal governments and political systems and their relationship with local, state, national and international governments; Maine Native American cultural systems and the experience of Maine tribal people throughout history; Maine Native American territories; and Maine Native American economic systems. After establishing these grade-specific learning objectives, DOE intends to assist the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs with developing Tribal histories that provide information for the grade-specific learning objectives and serve as overall histories for the Tribes to use as they deem appropriate.

Once the Maliseet and Micmac histories are completed, Wabanaki cultural experts, teachers, and curriculum developers will assemble to integrate separate Passamaquoddy and Penobscot curricula previously developed with the new Maliseet and Micmac histories into one integrated

Wabanaki curriculum which can serve as a baseline curriculum for all Maine public schools. This integrated curriculum would be available for free and made available in a number of ways, including web-based content, to make it as accessible to teachers as soon as possible. MITSC expects completion of the work in 2009.

#### **D. Support Wabanaki/Bates, Bowdoin, and Colby College Collaboration**

The Wabanaki/Bates, Bowdoin, and Colby Collaborative was formalized May 18, 2007 during a meeting which occurred at Indian Island. The presidents of Bates, Bowdoin, and Colby Colleges met with representatives of the five Wabanaki Tribes based in Maine to solidify a relationship initiated the previous fall. MITSC assisted then Penobscot Tribal Chief Jim Sappier to create the Wabanaki/BBC Collaborative and has actively supported its development.

The Wabanaki/BBC Collaborative exists to deepen the relationship between the Wabanaki Tribes and the three colleges. A principal focus of the Collaborative is to expand Wabanaki student educational opportunities. A steering committee guides the educational projects undertaken by the Collaborative comprised of the Wabanaki Education Task Force, a coordinator from each one of the colleges, and MITSC Chair Paul Bisulca. Three standing subcommittees exist dedicated to working with 5<sup>th</sup> to 8<sup>th</sup> graders, high school students, and creating campus climates to support the success of Wabanaki and Native American students.

During the initial year of the Collaborative, the group undertook two projects, one to raise the college aspirations of older elementary and middle school students and the other to expose prospective Wabanaki college-bound students to the Bates, Bowdoin, and Colby campuses and the competitive college admissions process (see appendix VI for a summary of year one educational initiatives). MITSC played an important communications facilitation role with both projects assisting BBC representatives at key junctures when they encountered difficulties communicating with the appropriate people within the Tribes.

MITSC views expanding educational opportunities for Wabanaki students as critical to helping the Tribes to continue to flourish in the 21<sup>st</sup> century. We view this type of support as part of our responsibilities under 30 MRSA §6212(3) to review the effectiveness of the social relationship between the Tribes and the State.

As of the publication of this report, the presidents for Bates, Bowdoin, and Colby had approved funding to support year two of the Collaborative. MITSC expects the colleges to begin successfully recruiting more Wabanaki students to attend their institutions in the near future. In addition, MITSC also anticipates the three colleges hiring more Wabanaki people for both staff and faculty positions.

#### **E. Strengthen University of Maine System and Individual Campus Programs Intended to Serve Wabanaki Students**

When the Wabanaki began exploring the idea of a Wabanaki Tribal College with MITSC's support, they wanted leadership within the University of Maine System and University of Maine

(UMaine) to understand that the Tribes appreciated the programs in place to support Wabanaki students. Wabanaki political and educational leaders viewed the potential creation of a Wabanaki Tribal College as an additional educational opportunity and expression of Tribal sovereignty, not a replacement for the UMS Tuition Waiver Program and related student support services. Ideally, the public higher education institutions would also assist the Wabanaki in developing the Tribal College by sharing their expertise and potentially allowing the fledgling college to utilize the UMaine's accreditation.

The need to approach UMS leaders about their possible assistance for the Wabanaki Tribal College caused Wabanaki leaders to request a review of UMS programs in order to evaluate and strengthen them. Wabanaki leaders wrote to Dr. Edna Szymanski, Senior Vice President for Academic Affairs and Provost, on February 8, 2007 seeking a meeting "to discuss the current and future state of Wabanaki education at the University of Maine." Tribal leaders met with Dr. Szymanski on May 25, 2007. Since that meeting, Dr. Szymanski left the University of Maine to accept a position as the president of Minnesota State University Moorhead.

Depending on the wishes of Wabanaki leaders, MITSC will assist them to engage Susan Hunter, Dr. Szymanski's successor, and other University of Maine administrators to continue the evaluation of UMaine Indian programs and how to strengthen them. MITSC will also press for a comprehensive examination of the UMS Tuition Waiver program including the compilation of data for each individual UMS campus and for each Wabanaki Tribe. The Tribal specific information could potentially reveal important insights concerning differences in matriculation and graduation rates that may merit specific action. Another important data set includes examination of Wabanaki graduation rates for each Tribe as compared to other population groups attending UMS schools.

#### **F. Promote Economic Development Cooperation Between the Wabanaki and State of Maine**

When MITSC adopted its workplan for FY 2008, tribal-state leaders were cautiously optimistic that the TSWG process had a reasonable prospect for success. With tensions in tribal-state relations somewhat temporarily abating as the issues concerning the Wabanaki finally got some attention, Wabanaki and State leaders identified economic development cooperation as the next priority for tribal-state relations. Wabanaki leaders ranked economic development as their highest priority for the 2007 Assembly of Governors and Chiefs held July 19. Unfortunately, no concrete proposal emerged from the 2007 Assembly that created a focal point for tribal-state cooperation.

Though MITSC possesses little collective knowledge concerning economic development, it diligently worked to identify both resources and something tangible that could unite Tribal and State economic development efforts. MITSC participated in several Tribal meetings seeking Wabanaki input regarding what the State could do to aid their economic development efforts. The Penobscots expressed interest in State legislation to facilitate their use of municipal bonds. Other Wabanaki Tribes were approached to explore their possible interest in developing the

legislation and working with the Penobscots to pass it. The bill to change the law to aid the Tribes' ability to use municipal bonds did not go forward.

With the abrupt deterioration in tribal-state relations, economic development cooperation, similar to the Wabanaki Tribal College, is extremely difficult in the current political environment. Lately and except for the Passamaquoddy Tribe, there has been little Tribal interest in working with the State on any issue. The overall condition of tribal-state relations must significantly improve to support joint economic development initiatives.

**G. Support Work Between the Passamaquoddy Criminal Justice Commission and the Department of Corrections to Address Barriers Experienced by Wabanaki Inmates Attempting to Practice Their Religion**

Passamaquoddy Motahkmikuk MITSC Commissioner Donald Soctomah initially asked the Commission to become involved with a number of criminal justice issues adversely affecting Passamaquoddy people. This request was followed by a request from then Passamaquoddy Tribal Representative Fred Moore asking MITSC to attend a meeting he had arranged between the Sipayik Criminal Justice Commission, the presiding officers and other members of the Maine Legislature, and Department of Corrections (DOC) Commissioner Martin Magnusson. Denise Altvater, Chair, and Jamie Bissonette, a consultant to the Sipayik group employed by the American Friends Service Committee, represented the Sipayik Criminal Justice Commission at the March 21, 2006 meeting. Denise and Jamie presented disturbing allegations about mistreatment Passamaquoddy people had suffered both in the Washington County Jail run by the Washington County Sheriff's Department, including the death of a Passamaquoddy inmate due to the denial of needed medical care, and DOC facilities run by the State of Maine. In addition, they alleged widespread suppression of Wabanaki inmates' rights to observe their religious practices. They also presented concerns about a Washington County probation officer and issues concerning the Washington County Drug Court.

Commissioner Magnusson agreed at the March 21, 2006 meeting to investigate all of the charges and report back to everyone. MITSC became involved to help ensure DOC followed through on the investigation and to support the development of new practices and policies to address the problems identified by the Sipayik Criminal Justice Commission. DOC began its investigation with the Washington County probation officer. A preliminary report was given to the Sipayik Criminal Justice Commission and MITSC in January 2007. The report was incomplete and suffered from a pervasive bias toward protecting the probation officer and the DOC for whom he worked instead of functioning as an objective analysis. MITSC encouraged the DOC to continue the investigation and to rewrite portions of the report to achieve a better balanced document.

Donald Soctomah succeeded Fred Moore as Passamaquoddy Tribal Representative in September 2006. In response to the difficulties Wabanaki people were experiencing practicing their religion while incarcerated, he introduced LD 507, An Act Recognizing Native American Religion in Maine Prisons and Jails. The legislation provides Native Americans a right to a reasonable opportunity to observe and participate in Native American religious practices and ceremonies. It

also directs the DOC Commissioner with the assistance of a Native American advisory group to develop guidance policies to accommodate Native American religious practices.

The public hearing for LD 507 occurred March 7, 2007. Several groups testified in support of LD 507 including MITSC. At a subsequent work session, the Judiciary Committee asked DOC to work with the Sipayik Criminal Justice Commission and Wabanaki Tribal Governments to resolve the outstanding issues concerning the ability of Native American inmates to exercise their religious rights. The Judiciary Committee said it would hold the bill over until the next year with the expectation that DOC would address Tribal concerns regarding Wabanaki inmates' opportunity to practice their religion. If satisfactory progress was not made, the Judiciary Committee stated it would suggest passage of LD 507. The Judiciary Committee followed up this oral directive to DOC with a letter to Commissioner Magnusson dated June 20, 2007.

The DOC highly resented how it had been forced to attend the meeting held in the Speaker's Office on March 21, 2006 and compelled to defend a shocking list of allegations. To its credit, DOC moved beyond that resentment to begin systematically addressing a number of the issues identified by the Sipayik Criminal Justice Commission. When called upon by the Sipayik Criminal Justice Commission MITSC has met and otherwise communicated with DOC officials to encourage action and forward progress.

As part of its multi-faceted response to Tribal concerns and the directive given to it by the Judiciary Committee, the DOC revised its guidelines for strip searches in the summer of 2007. It invited the Sipayik Criminal Justice Commission to submit comments on the draft Universal Strip Search Regulations before the rules were officially adopted. Though the Sipayik Criminal Justice Commission did not persuade the DOC to adopt all of its suggestions, it considers the rules a major improvement. The criteria specifying when and under what circumstances female Wabanaki inmates may be subjected to strip searches has been significantly narrowed to better reflect legitimate security interests.

The DOC allowed the first sweat lodge ceremony to take place in a Maine prison on May 18, 2007 at the Bolduc Correctional Facility. Everyone involved agreed it was a tremendous success. This fall a second sweat lodge ceremony was permitted at the Maine State Prison in Warren (see Appendix VII) and a third one is scheduled for October 31 at the Downeast Correctional Facility.

Following the adoption of the Universal Strip Search Rules, DOC initiated revisions to its Policy Number 24.3, Religious Services, General Guidelines. This policy delineates the DOC's policy to accommodate inmate religious practices. An important addition to the policy is the creation of an Advisory Group of Tribal Representatives to work with the department to develop procedures for how Native American ceremonies will be conducted. The initial Maine Wabanaki appointees to the Advisory Group include Richard Silliboy, Aroostook Band of Micmacs, Newell Lewey, Houlton Band of Maliseet Indians, Stephanie Bailey, Passamaquoddy Tribe at Motahkmikuk, Brian Altvater and Denise Altavater, Passamaquoddy Tribe at Sipayik, and Arnie Neptune, Penobscot Nation. Jamie Bissonette, Abenaki Missisquoi/Odenak, David Gehue, Mi'kmaq, and Paul Thibeault, Native American Unit, Pine Tree Legal Assistance, comprise the remainder of the Advisory Group.

## **H. Monitor State Observance of Sustenance Fishing Rights Guaranteed to the Passamaquoddy Tribe and Penobscot Nation under 30 MRSA §6207(4)**

Passamaquoddy and Penobscot sustenance fishing rights provided under 30 MRSA §6207(4) often are challenged whenever powerful economic interests perceive the assertion of these rights may constrain their activities. Such interests challenged Tribal fishing rights during the Judiciary Committee's deliberations concerning LD 2221. Both the Houlton Water Authority and the Maine Pulp and Paper Association expressed opposition to the Houlton Band of Maliseet Indians obtaining the same sustenance fishing rights on the Meduxnekeag River currently enjoyed by the Passamaquoddy Tribe and Penobscot Nation.

MITSC advocated that the Maliseets receive the same sustenance fishing rights as the other two Tribes. The Judiciary Committee decided in the final version of LD 2221 reported from the Committee that the Maliseets must negotiate with interested parties "regarding the effect of any exercise of sustenance fishing rights by members of the band on those parties and ways to balance the interests of both the band and the affected parties." Maliseet sustenance fishing rights could have been severely compromised under the process prescribed by the Judiciary Committee.

The Judiciary Committee's willingness to potentially compromise new sustenance fishing rights for the Maliseets represents one of a number of recent examples in which the State demonstrates insufficient concern for sustenance fishing rights. Decisions by the Maine Atlantic Salmon Commission to establish fall fishing seasons for Atlantic salmon on the Penobscot River in 2006 and 2007 and a spring season in 2008 did not appear to provide sufficient weight to Penobscot Nation concerns about reopening sport fishing for this threatened species. In addition, the Maine Atlantic Salmon Commission has resisted MITSC requests for early consultation and input regarding any management decisions that may affect Tribal sustenance fishing rights.

Historically, the State has interpreted the sustenance fishing right under 6207(4) to permit the Tribes to take whatever fish could be caught instead of a more affirmative obligation to ensure healthy fish populations exist with fish suitable for human consumption. Currently, a health advisory exists on the Penobscot River below Lincoln advising people to limit their consumption of fish to 1-2 meals per month. Eating fish once to twice a month does not constitute a sustenance fishing right.

MITSC expects the State and the Wabanaki to resume discussions regarding MIA. When those discussions resume, the parties may want to devote some attention to clarifying and strengthening sustenance fishing rights that the Tribes consider critical to their identities as Indigenous Peoples. The State must demonstrate a willingness to defend and protect Tribal sustenance fishing rights if it wishes to maintain that it has complied with the terms of the Maine Indian Claims Settlement.

## **I. Consider Holding a Summer 2008 Fisheries Workshop**

MITSC did not hold a Summer 2008 Fisheries Workshop.

**J. Establish Strong Presence on Any Bills Supported or Opposed by MITSC and Monitor Other Legislation Potentially Affecting Tribal-State Interests during 2<sup>nd</sup> Session of the 123<sup>rd</sup> Maine Legislature**

MITSC supported LD 1957, An Act to Restore Diadromous Fish in the St. Croix River, LD 2221, An Act To Implement the Recommendations of the Tribal-State Work Group, and LD 2306, An Act To Amend the Definition of “Penobscot Indian Reservation.” Beyond testifying in support of LD 1957, MITSC Chair Paul Bisulca attended a subsequent Marine Resources Committee work session to offer Committee members additional information. LD 1957 passed in an amended form.

As previously discussed under section V.A. of this report, MITSC staffed the Tribal-State Work Group. Paul Bisulca served as one of the TSWG’s 18 members. He testified in support of the bill. John Dieffenbacher-Krall also testified on LD 2221, focusing on the TSWG process and the January 2008 Final Report it issued. MITSC attended nearly all of the Judiciary Committee’s work sessions held on LD 2221 and spent a considerable amount of time speaking to Committee members and staff, Tribal representatives, the Governor’s office, and other parties involved in the legislation in an effort to pass the bill.

Paul Bisulca testified in support of LD 2306, a Governor’s bill sponsored by Penobscot Tribal Representative Donna Loring, at the public hearing held April 11, 2008. MITSC also attended the Judiciary Committee work session held April 14, 2008. The Judiciary Committee voted ought not to pass on LD 2306, killing the bill. In lieu of passing the bill, the Judiciary Committee wrote to the Land Use Regulation Commission (LURC) on April 24, 2008 urging it to enter into a memorandum of understanding with the Penobscot Nation with respect to the Tribe’s housing project in Argyle. LURC responded August 6, 2008 that it “is prepared to work with the Nation and review any proposal in compliance with all legal requirements.”

**K. Continue Wabanaki Leaders Meetings and Outreach and Communication to Tribal Leadership**

MITSC previously noted its work organizing and facilitating Wabanaki Leaders’ meetings under section III.D of this report.

**L. Continue Outreach and Communications to Executive and Legislative Branches of State Government Including Briefing to State Senate, Possible Legislative Tour of Indian Island**

MITSC earlier reported on its outreach to Executive, House, and Senate leaders under section III.D of this report. MITSC did receive an opportunity to address the State Senate on January 17, 2008. MITSC had prepared for a briefing similar to the one it gave the previous year in the Maine House on January 25, 2007. Please see Appendix II for the remarks MITSC had intended to deliver in the Senate. Upon arriving at the Senate Chambers, Senate President Beth Edmonds asked MITSC to limit its remarks to 15 minutes. She then recessed the Senate and called the body back into session with MITSC speaking from the Senate rostrum. To hear MITSC’s



remarks, go to <http://www.maine.gov/legis/president/NewsReleases/MITSCat%20MESenate-2008-01-17.mp3>.

Twenty-eight legislators, including two Senators and 26 House members, participated in the legislative tour to Indian Island held January 16, 2008. MITSC organized the event with the Penobscot Nation. Besides State Legislators, representatives from the Episcopal Committee on Indian Relations, Friends Committee on Maine Public Policy, Maine Council of Churches, Maine People's Alliance, and Stockton Springs Historical Society attended the tour. MITSC heard anecdotal reports from both the legislators and NGOs who attended the tour that they greatly benefited from it.

#### **M. Provide Logistical Support and Staffing for 2008 Assembly of Governors and Chiefs**

As of the publication of this report, the 2008 Assembly of Governors and Chiefs had not been scheduled.

#### **N. Support the Penobscot River Restoration Project**

MITSC endorsed the Penobscot River Restoration Project (PRRP), an initiative to remove the Great Works and Veazie Dams and bypass the Howland Dam, in 2006. Kleinschmidt Energy and Water Resource Consultants published the report, *Penobscot River Restoration Trust Scoping Document for the Veazie, Great Works and Howland Projects*, in November 2007 on behalf of the Penobscot River Restoration Trust. The Federal Energy Regulatory Commission (FERC) requires the scoping process to identify issues, concerns and opportunities for modification, enhancement or mitigation associated with a proposed action. MITSC submitted comments to the Penobscot River Restoration Trust on December 17, 2007 in response to the Scoping Document and request for public comment. MITSC emphasized the potential benefits that the PRRP could achieve in restoring sea-run fish species that could provide a safer sustenance fishing source due to the toxic contamination of resident fish species in the Penobscot River (see Appendix V).

### **VI. Other MITSC Activities**

#### **A. Ensure Full Implementation of Maine's Offensive Place Names Law**

Maine enacted Public Law 1999, Chapter 613 (LD 2418, An Act Concerning Offensive Names) in 2000. Passamaquoddy Tribal Representative Donald Soctomah introduced the bill at MITSC's request. The law adds the words "squaw" or "squa" to the list of prohibited geographic place names.

Under the law, municipalities and, in the instances in which offensive places names occur in unorganized territories, county commissioners, possess the responsibility for replacing offensive names with new ones within six months "of the determination that the place has an offensive name." On September 8, 2006, the Bangor Daily News reported that the Piscataquis County Commissioners had written Governor Baldacci in August 2006 requesting they be allowed to

resume using the offensive place name squaw. The Piscataquis County Commissioners cited the fact of non-compliance in other communities across the State as justification for their request.

Upon reading the Bangor Daily News article, MITSC instantly perceived the potential for the law banning the words squaw and squa to unravel. MITSC discussed the letter written by Piscataquis County Commissioners and the potential for undermining the Offensive Place Names Law at its October 17, 2006 meeting. Following the meeting, MITSC Executive Director John Dieffenbacher-Krall wrote to Department of Conservation Commissioner Patrick McGowan on October 25, 2006 asking him to “contact the offending municipalities to request that they comply with the State law or that you seek enforcement action pursuant to §1103.” At the time MITSC wrote the letter, the Towns of Standish and Stockton Springs and the Washington County Commissioners were in non-compliance with the law.

The responsibility for contacting non-compliant governments fell to the State Geologist, Robert Marvinney. His position in State Government maintains a list of Maine geographic place names that get forwarded to the US Geological Survey and US Board on Geographic Names, the body responsible for keeping the official national list of place names. Mr. Marvinney did contact the non-compliant governments. Standish changed Squaw Island to Miller’s Isle at a June 5, 2007 Town Council meeting. No action was taken by Stockton Springs or the Washington County Commissioners.

At the MITSC meeting held June 15, 2007, Commissioners unanimously voted to file complaints with the Maine Human Rights Commission, the governmental body with the responsibility for enforcing the Offensive Place Names Law, against Stockton Springs and the Washington County Commissioners. John Dieffenbacher-Krall filed the complaints with the Maine Human Rights Commission on behalf of MITSC on July 11, 2007. The Washington County Commissioners responded by changing the name Squaw Island in Big Lake to Epahsakom which means in the Passamaquoddy language “middle of the lake.” Stockton Springs remained the sole community in non-compliance with the Offensive Place Names Law.

Stockton Springs initially responded to the MITSC complaint filed with the Maine Human Rights Commission by changing “Squawpoint Road” to “Squapoint Road,” “Squaw Head” to “Squahead” and “Squawpoint” to “Squapoint.” Stockton Springs Selectpeople took this action on September 6, 2007 to exploit a weakness in the Offensive Place Names Law that prohibits any use of the word “squaw” either alone or in combination but permits the use of the spelling “squa” when used in combination with other letters or a word. Stockton Springs adopted this approach despite a January 2, 2007 memo from Penobscot Nation Chief Kirk Francis to the Stockton Springs Selectpeople asking the Town to “not consider the spelling Squa as an acceptable alternative to using the word squaw.” Chief Francis’ memo explains how offensive the Penobscot People consider the word squaw.

The word Squa was a word adopted by Europeans to brand Indian women. The word never came from any of the tribes. The name squaw insults and defames Native women everywhere. We have always valued and honored Native women. Our society was an egalitarian society where, at one time, Native women had the

responsibility of handling all matters at home, while Native men hunted and kept the tribes from starving. This society has continued to this day with both genders working together to keep our families and tribes flourishing.

Though Stockton Springs had come into technical compliance with the law, MITSC felt the Town's action did not comply with the spirit of the law. MITSC had a challenging political situation because Stockton Springs had complied with the law by changing the word squaw to squa. Yet the Commission heard directly from its Wabanaki MITSC Commissioners and other Wabanaki people that the name changes made by the Stockton Springs Selectpeople were unacceptable. MITSC also received a petition from 12 members of the Stockton Springs community that states:

We who are members of the Stockton Springs community would like to extend our apologies to the Maine State Tribal people.

Our belief is that the decision by two of our three selectpeople, to retain the usage of Squaw, does not reflect the values of all our community.

We wish to treat all people with dignity. It is our hope that the Maine Human Rights Commission will support the removal of the term or any variation from usage in Stockton Springs.

MITSC decided to appeal to Stockton Springs leaders to forego any use of the words squaw or squa whether alone or in combination. MITSC contacted editorial writers for Maine daily newspapers asking them to denounce the action taken by Stockton Springs. The Portland Press Herald, Times Record, Sun Journal, Kennebec Journal, and Morning Sentinel all editorialized criticizing the Stockton Springs action to stick with squa. The Bangor Daily News had previously editorialized on the issue in July 2007.

With Maine daily newspapers (with the exception of the Journal Tribune which to MITSC's knowledge never took a position on the issue) solidly behind MITSC and the Wabanaki, MITSC sought a meeting with the Stockton Springs Selectpeople to ask them to change the three offensive place names. MITSC met with the Stockton Springs Selectpeople and Town Manager Joe Hayes on October 16, 2007 at the Brewer Auditorium. Francia Davis, Compliance Officer for the Maine Human Rights Commission, also attended the meeting. Initially, two of the three Selectpeople, the same individuals who had voted to change the word squaw to squa, expressed opposition to the MITSC request to abandon any use of the words squaw or squa. As the meeting progressed, MITSC appeared to achieve an understanding with the resistant Selectpeople.

On October 18, 2007, the Stockton Springs Board of Selectpeople voted to change Squapoint to Defence Point, Squahead to Defence Head, and Squapoint Road to Defence Point Road. The Penobscot Nation reacted positively to the Town's action. Chief Kirk Francis sent the Stockton Springs Selectpeople a memo dated November 1, 2007. In it he writes:

We, the Penobscot Indian Nation, Tribal Chief, Vice-Chief, Council and members of the Tribe would like to thank the Stockton Springs Town Selectmen for changing the three offensive place names to the name Defence. I understand the name is in tribute to a ship, which sunk in your harbor near the places that bore the offensive name. This privateer ship, a part of the Revolutionary War, is quite historically significant to your town.

We too, honor our ancestors and many of the events that led us to where we are now. We are grateful to our relations for having walked these lands and we are proud of their footsteps that forever mark many of the paths, which have become a part of the history in Stockton Springs. May our paths always cross in the spirit of friendship and peace.

A private homeowners association, The Squawpoint Association, has bitterly resisted the name changes. It has complained to the Selectpeople and threatened legal action against the Town. The group had also threatened to appeal to the US Board of Geographic Names. But the group missed the deadline to file an appeal, and the Board approved the proposals to change the names Squaw Head and Squaw Point to Defence Head and Defence Point at its June 12, 2008 meeting.

#### **B.     Publicity for *Wabanaki: A New Dawn***

MITSC commissioned a 28 minute documentary in 1989 to inform the general public about the Wabanaki and to serve as a source of pride for Wabanaki people. David Westphal and Dennis Kostyk completed the film, *Wabanaki: A New Dawn*, in 1995. The film, originally produced in VHS format, was converted to DVD format in the fall of 2006. Thanks to a grant from the Episcopal Committee on Indian Relations MITSC made 1,000 copies in DVD format.

Though *Wabanaki: A New Dawn* was completed 13 years ago, MITSC receives consistent comments from Wabanaki People that the film captures important cultural, historical, political, and spiritual information essential to understanding the Wabanaki and tribal-state relations today. In an effort to make more Mainers aware of the film, MITSC consented to writing a 1500 word review of the film for *Memories of Maine* magazine. The review, “Wabanaki: A New Dawn A New Dawn Captures Struggle for Cultural Survival,” was published in the Maine Highlands Edition of *Memories of Maine* magazine in the Spring 2008. Anyone desiring a copy of the issue to read the review should contact MITSC Executive Director John Dieffenbacher-Krall.

## **Appendix I**

(Note: The complete TSWG narrative and appendix 1 are presented here. To read the whole report, visit the MITSC website at  
<http://www.mitsc.org/library.php?do=section&name=Reports>)

### **STATE OF MAINE 123<sup>RD</sup> LEGISLATURE SECOND REGULAR SESSION**

**Final Report  
Of the Tribal-State Work Group  
Created by  
Resolve 2007, Chapter 142, 123<sup>rd</sup> Maine State Legislature  
Resolve, To Continue the Tribal-State Work Group**

**January 2008**

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## **Table of Contents**

I. Executive Summary	i
II. Rationale for the Creation of the Tribal-State Work Group	1
III. Tribal-State Work Group	1
IV. Tribal-State Work Group Findings	2
V. Background	6
VI. Deliberations and Meetings of the Tribal-State Work Group	7
VII. Recommendations	12

## **Appendices**

1. Proposed legislation An Act To Amend the Maine Implementing Act and the Micmac Settlement Act
2. Executive Order 19 FY 06/07 An Order to Create a Tribal-State Work Group to Study Issues Associated with the Maine Implementing Act
3. Chapter 142, Resolve, To Continue the Tribal-State Work Group
4. Members of the Tribal-State Work Group
5. October 3, 2007 Wabanaki PowerPoint presentation, History & Perspectives of the Wabanaki Tribes
6. Near transcripts of remarks made by John Paterson, former Maine Deputy Attorney General, and Tim Woodcock, US Senate Select Committee on Indian Affairs staffperson, to the TSWG 11/19/07
7. Opening Statement of Butch Phillips, Penobscot Nation, to the Tribal/State Work Group Oct. 3, 2007

8. Passamaquoddy/Penobscot Maine Implementing Act Side-by-Side Comparison 1/8/2008
9. The Tribes of Maine January 2008
10. Items for Potential Further Discussion
11. Omnibus Tribal Sovereignty Act of 2008
12. Representative Simpson/Reinsch Proposed Statutory Changes
13. FRAMEWORK FOR DISCUSSION WABANAKI/STATE OF MAINE LEADERS  
MEETING Mutual Freedom, Partnership, and Prosperity: The Social, Economic and Legal  
Relationship between the Wabanaki Tribes and the State of Maine May 8, 2006
14. Minutes for the Tribal-State Work Group Meeting August 20, 2007
15. Minutes for the Tribal-State Work Group Meeting October 3, 2007
16. Minutes for the Tribal-State Work Group Meeting November 19, 2007
17. Minutes for the Tribal-State Work Group Meeting December 5, 2007
18. Minutes for the Tribal-State Work Group Meeting January 11, 2008

## **Executive Summary**

The 18 members of the Tribal-State Work Group met five times unanimously agreeing to eight specific recommendations, seven of which comprise suggested changes to the Maine Implementing Act (MIA) and the Micmac Settlement Act (see appendix one model legislation An Act To Amend the Maine Implementing Act and the Micmac Settlement Act). The Work Group agreed to the following eight recommendations:

1. Change the heading for Title 30 from “Municipalities and Counties” to “Municipalities, Counties and Indian Tribes”
2. Amend the law to achieve jurisdictional parity for all Tribes
3. Institute mandatory mediation by the Maine Indian Tribal-State Commission (MITSC) for tribal-state disputes prior to going to court with deadlines and requiring all parties to act in good faith
4. Require mandatory meaningful consultation with Tribes prior to any legislative, regulatory or policy change by the State that may have an impact on the Tribes
5. MITSC to continue studying and analyzing potential changes to the Act and may make formal recommendations to amend the Act to the Judiciary Committee every two years, or more often as it deems appropriate, with MITSC having the explicit authority to introduce such legislation
6. The Maine Tribes not be subject to the Freedom of Access laws (FOA) for any purpose. The Work Group said this should be included under the internal tribal matters language, not the municipality status language, in the MIA.
7. Include a new statement of intent for the settlement acts that specifies that the documents are to be viewed as dynamic, flexible, and to be regularly revisited. In addition, the Aroostook Band of Micmacs should be added to MITSC with a corresponding additional seat(s) for the State.
8. Task the Executive Branch of State Government to invite the Tribes to discuss unresolved issues and sovereignty

In addition to these eight recommendations, the Tribal-State Work Group also made several important findings:

1. Contrary to what some people have asserted for the past two decades, the negotiators themselves designed MIA to be a dynamic, living agreement with the flexibility to make adjustments in the jurisdiction and powers of each signatory and in the relationship between the Tribes and the State. This is supported by the statutory language of the Maine Indian Claims Settlement Act (MICA).

2. The negotiators of the settlement agreement never intended to equate the Passamaquoddy Tribe and the Penobscot Indian Nation with Maine municipalities. The



negotiators viewed the powers of self-government confirmed in MIA as more akin to home rule powers defining a specific bundle of rights that would be recognized by the State and the Tribes.

3. Despite the intentions of the settlement act negotiators that the agreements enhance Tribal Governments, Wabanaki living conditions, and Tribal culture, gains in these areas have been modest and lag far behind other population groups in Maine.

4. The Wabanaki's principal motivation for agreeing to MIA, MICSA, and the Aroostook Band of Micmacs Settlement Act (ABMSA) was to regain the freedom to control their lives and governments that they had lost due to European settlement in Maine and Maine becoming a state.

5. The Houlton Band of Maliseet Indians and Aroostook Band of Micmacs have different concerns about the interpretation and implementation of their settlement acts than the highly disputed internal tribal matters and municipality status in §6206 of MIA that principally concern the Passamaquoddy Tribe and Penobscot Nation.

6. The Houlton Band of Maliseets and Aroostook Band of Micmacs desire some accommodation to enjoy sustenance hunting rights now only practically available to the Passamaquoddy Tribe and Penobscot Nation.

## **Rationale for the Creation of the Tribal-State Work Group**

A major focus of the May 8, 2006 Assembly of Governor and Chiefs addressed the disputed interpretations involving the Maine Implementing Act (MIA). The State of Maine and the Wabanaki Tribes have extensively litigated certain provisions of MIA straining tribal-state relations. All the parties express dissatisfaction with the outcome of litigation. Governor Baldacci stated at the May 8, 2006 Assembly:

While we are doing what we are doing, we need to create a new foundation for us and future chiefs and governors. I don't want to go to court. I want to get the relationship to a point without fear of what people are doing, why they are doing it.

The leaders assembled in Veazie May 8, 2006 agreed to create a process to examine possible changes to MIA. Governor Baldacci offered to issue an executive order creating a group consisting of Tribal and State representatives. He issued the executive order July 10, 2006 (see appendix two).

The Tribal-State Work Group created under Governor Baldacci's executive order met three times during the fall of 2006. It issued a final report, Report of the Tribal-State Work Group to Study Issues Associated with the Maine Implementing Act, on December 6, 2006. Among the Work Group's recommendations included its support for continuing the Group as a legislative body. Representative Dick Blanchard sponsored LD 1263, Resolve, To Continue the Tribal-State Work Group. It passed the Maine Legislature in June 2007, and it was signed into law by Governor Baldacci (Resolve 2007, Chapter 142, 123<sup>rd</sup> Maine Legislature see appendix three).

## **Tribal-State Work Group**

Resolve 2007, Chapter 142 directs the Tribal-State Work Group (TSWG) to:

examine the issues identified in the framework document prepared for the Assembly of the Governors and Chiefs held May 8, 2006, the minutes for that meeting, Tribal-Maine Issues: Issues That Have Been Litigated or Are in Litigation, and Tribal-Maine Issues: Macro Issues prepared for the May 31, 2006 review of AN ACT to Implement the Maine Indian Claims Settlement, the federal Maine Indian Claims Settlement Act of 1980 and other settlement acts pertaining to the Wabanaki Tribes for the meeting held at Indian Island May 31, 2006, the minutes for the May 31, 2006 meeting and the final report of the tribal-state work group created by Executive Order 19 FY 06/07;

Section three of the Resolve specifies that the Work Group consists of 17 members:

1. Two members of the Senate, appointed by the President of the Senate;
2. Six members of the House of Representatives, appointed by the Speaker of the House;
3. One representative of the Passamaquoddy Tribe at Indian Township appointed by the Governor;

4. One representative of the Passamaquoddy Tribe at Pleasant Point appointed by the Governor;
5. One representative of the Penobscot Nation appointed by the Chief;
6. One representative of the Houlton Band of Maliseet Indians appointed by the Chief;
7. One representative of the Aroostook Band of Micmacs appointed by the Chief;
8. The Passamaquoddy Tribal Representative to be appointed by the Joint Tribal Council of the Passamaquoddy Tribe;
9. The Penobscot Nation Tribal Representative to be appointed by the Chief;
10. One member appointed by the Governor of the State of Maine;
11. One representative of the Maine Indian Tribal-State Commission.

Penobscot Nation Chief Kirk Francis named Tribal Elders Butch Phillips and James Sappier as his Tribe's two representatives to the TSWG. Chief Phillips-Doyle also appointed himself. The final TSWG membership totaled 18 people (see appendix four).

The original version of Chapter 142 required the Tribal-State Work Group to issue a report by December 5, 2007 encompassing its findings, recommendations, and suggested legislation to the Second Regular Session of the 123rd Legislature, the Governor of the State of Maine, the Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe at Indian Township, the Passamaquoddy Tribe at Pleasant Point and the Penobscot Nation. Finding it could not meet the December 5, 2007 reporting deadline, the TSWG through Senator Libby Mitchell approached the Legislative Council to submit an after-deadline bill to extend the reporting date from December 5 to January 20, 2008. Senator Mitchell gained approval from the Legislative Council for her bill. It became LD 1970, Resolve, To Extend to January 20, 2008 the Reporting Deadline for the Tribal-State Work Group. The Joint Standing Committee on Judiciary voted unanimously to support the extension legislation, and final enactment was pending as this report was being completed.

### **Tribal-State Work Group Findings**

The Tribal-State Work Group unanimously supported changes to the Maine Implementing Act (30 MRSA §6201 - §6214) and Micmac Settlement Act (30 MRSA §7201 - §7207) in seven areas.

#### **1. Change the heading for Title 30 from “Municipalities and Counties” to “Municipalities, Counties and Indian Tribes”**

The Wabanaki Tribes are not municipalities or counties. They are Tribal Governments formally recognized by the United States and the State of Maine. The Wabanaki representatives on the TSWG expressed their desire to have the heading for Title 30 accurately reflect all the types of governments addressed in it. State appointees to the TSWG concurred.

## **2. Amend the law to achieve jurisdictional parity for all Tribes**

The Maine Implementing Act delineates a jurisdictional relationship for the Passamaquoddy Tribe and Penobscot Indian Nation with the State of Maine different than the one specified for the Houlton Band of Maliseets. The Aroostook Band of Micmacs have an entirely separate settlement act with the State and their own agreement with the United States (Aroostook Band of Micmacs Settlement Act (ABMSA)). As the TSWG process progressed, a consensus emerged that the Maliseets and Micmacs deserved jurisdictional parity with the Passamaquoddy Tribe and Penobscot Nation.

## **3. Institute mandatory mediation by MITSC for tribal-state disputes prior to going to court with deadlines and requiring all parties to act in good faith**

As noted in the Rationale for the Creation of the Tribal-State Work Group, a major impetus for the creation of the body was to explore the resolution of issues before litigation involving MIA or the other settlement acts. The Tribes and State have spent large sums of money on litigation. Besides the high costs associated with it, litigation accentuates tensions between the parties and strains tribal-state relations. It creates an adversarial relationship when all the parties express a desire to have cooperative and mutually beneficial relations.

Work Group members heard from MITSC Chair Paul Bisulca that MITSC has no statutory authority to compel parties with disputes involving MIA to submit such disputes to the Commission for possible resolution. Discussion ensued on how to compel parties with disputes involving MIA to come before MITSC before going to court. Mike Mahoney said a parallel provision exists in the Maine Rules of Civil Procedure, 16(b), Pretrial Order and Trial Management Conference. He explained a mediator has to certify to the court that a good faith effort has been made by the parties to settle prior to allowing the case to go to trial. Work Group members liked the idea of requiring MITSC mediation of disputes prior to going to court. It appears as recommendation number three.

## **4. Require mandatory meaningful consultation with Tribes prior to any legislative, regulatory or policy change by the State that may have an impact on the Tribes**

A recurring Tribal criticism of how the State interacts with the five Tribal Governments is the failure to uniformly consult with them whenever legislative, regulatory or policy changes under consideration may affect them. A Federal executive order exists (Executive Order 13175-- Consultation and Coordination With Indian Tribal Governments) directing all Federal departments and agencies to undertake such consultation with the Tribes. State representatives on the TSWG thought a parallel requirement for State actions that may affect the Tribes was reasonable.

## **5. MITSC to continue studying and analyzing potential changes to the Act and may make formal recommendations to the amend the Act to the Judiciary Committee every two years, or more often as it deems appropriate, with MITSC having the power to introduce such legislation**

The TSWG agreed that MITSC's advisory role as an authority on ways to strengthen tribal-state relations and MIA should be enhanced. The TSWG received information that MITSC recommendations have often gone unheeded. If MITSC perceives a need for statutory changes to MIA, it must rely on the Governor of Maine or a member of the Maine Legislature to introduce

such legislation. To remedy this problem, the TSWG recommends that MITSC continue analyzing and studying changes to MIA and be given explicit authority to introduce legislation to implement its proposed resolution to any observed deficiencies in MIA.

**6. The Maine Tribes should not be subject to the Freedom of Access laws (FOA) for any purpose. In MIA, the TSWG said this should be included under the internal tribal matters language, not the municipality status language.**

The applicability of the Maine Freedom of Access Act to the Tribes has been litigated twice this decade. The first case involved a FOAA request made by three paper corporations during the State's application to obtain sole licensing authority under the Clean Water Act from the Federal Government. In 2001, the Maine Supreme Court ruled largely against the Passamaquoddy Tribe and Penobscot Nation (Great Northern Paper Inc. et. al. v. Penobscot Nation, 2001 ME 68). The Maine Supreme Court issued this decision despite MITSC twice unanimously asserting it strongly believed that in the particular circumstances the FOAA was not applicable to the two Tribes.

Two years ago Maine Superior Court Justice Thomas Humphrey ruled that the Pleasant Point Reservation acted as a business corporation, not a municipality, in negotiating a land lease with an Oklahoma firm, denying a Bangor Daily News and Quoddy Tides request for Passamaquoddy documents. It was later affirmed by the Maine Supreme Court (Winifred B. French Corporation et. al. v. Pleasant Point Passamaquoddy Reservation, 2006 ME 53). Despite the legal victory, the Passamaquoddy Tribe did not greet the decision with enthusiasm as it prevailed only because the Court viewed it as acting in a business capacity, not in its Tribal Government function.

TSWG members unanimously felt that the FOA laws do not apply to the Tribes. Tribal Governments are not municipalities, counties, or parts of State Government. Tribes must have the freedom to deliberate and conduct governmental relations as they see appropriate without outside parties requesting documents that intrude on the core of self-government activities.

**7. That the statement of intent for the settlement acts specify that the documents are to be viewed as dynamic, flexible, and to be regularly revisited. In addition, that the Aroostook Band of Micmacs should be added to MITSC with a corresponding additional seat(s) for the State.**

Since the enactment of MIA, something of a myth has emerged that the agreement was "carved in stone" and never intended to be amended. This notion is wrong and is neither supported by the statutory language of MICA nor the agreement's negotiators. Title 42 of the United States Code, Section 1725 (e) gave Congressional preauthorization to the State and Tribes to amend MIA within certain broad areas. Attorney General Steve Rowe confirmed this understanding at the TSWG meeting held November 19, 2007. Tim Woodcock, a staffperson for the US Senate Select Committee on Indian Affairs who helped write MICA, confirmed MICA authorization for State/Tribal changes to MIA.

It (referring to MICA) also ratified and approved the MIA. It also ratified and approved and sanctioned agreements prospectively that the State and Tribes might make respecting jurisdiction and other important issues that otherwise you might

have to go to Congress to get approval for so you have that authority in advance.  
(Statement of Tim Woodcock to the TSWG, November 19, 2007)

A few sentences later Tim Woodcock continued:

And I recognized that the MICSA and the MIA might well just be the beginning of an ongoing relationship that might well have a considerable amount of dynamism in it and it might well be revisited from time to time to be adjusted. There was a mechanism for that to happen and I have to say in retrospect it's been a surprise to me that it really hasn't been amended at some point but I also recognize certainly that these are knotty issues.

The TSWG members unanimously agreed that MIA should be viewed as a living, dynamic document that had flexibility built into it to allow adjustments warranted by changes in the tribal-state relationship.

MIA originally reserved membership in MITSC to the Passamaquoddy Tribe, Penobscot Nation, and State of Maine. Last year, the Legislature enacted LD 373, An Act To Change the Membership of the Maine Indian Tribal-State Commission To Add Seats for the Houlton Band of Maliseet Indians and the State. LD 373 did not become law as the Penobscot Nation submitted its approval of the changes to MIA one day late. However, the State and the Tribes have agreed to act as though LD 373 became law. MITSC now consists of two representatives each for the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation with the State having six. The twelve MITSC Commissioners elect the chair. Doug Luckerman, counsel for the Micmacs, informed the TSWG that his client desires MITSC membership. The TSWG members unanimously supported this recommendation.

The TSWG's final unanimous recommendation tasks the Governor's Office with engaging the Tribes on the unresolved issues involving sovereignty, self-government, the internal tribal matters and municipality language of §6206 in MIA, and other unresolved issues. Governor Baldacci's office had already begun arranging an initial meeting at the time of this report's publication.

### **Background**

The Maine Legislature passed An Act to Provide for Implementation of the Settlement of Claims by Indians in the State of Maine and Create the Passamaquoddy Indian Territory and Penobscot Indian Territory as P.L. 1979, ch. 732. It is commonly referred to as the Maine Implementing Act (MIA). The US Congress passed companion legislation in 1980 known as the Maine Indian Claims Settlement Act (MICSA). The State and Federal Acts settled land claims brought by the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Indian Nation.

The Passamaquoddy Tribe and Penobscot Nation forced the US Dept. of Justice to file a lawsuit on their behalf in the summer of 1972 to recover 12.5 million acres assessed at \$25 billion. In 1980, the Maliseets joined the land claims process. Eventually, the lawsuit was

settled in 1980 and produced the Maine Indian Claims Settlement Act and Maine Implementing Act. The overall Settlement totaled \$81.5 million paid exclusively by the Federal Government.

The monetary Settlement consisted of two parts. A Maine Indian Claims Land Acquisition Fund was created with \$54.5 million that made the Passamaquoddies and Penobscots eligible to place up to 150,000 acres each into trust in return for voluntarily dismissing their land claims. Trust lands are reserved for the sole use of the Tribe for which they are held with the deed of ownership kept by the Secretary of the Interior on behalf of the United States. The Houlton Band of Maliseets received a much smaller settlement of \$900,000 paid from the land acquisition money received by the Passamaquoddy Tribe and Penobscot Nation leaving the Passamaquoddies and Penobscots with \$26.8 million each. In addition, the Act established a Maine Indian Claims Settlement Fund with a deposit of \$27 million divided in half for the Passamaquoddy Tribe and Penobscot Nation to be held in trust by the Secretary of Interior.

Nine years after passage of MIA the State of Maine and the Aroostook Band of Micmacs negotiated the Micmac Settlement Act. The Micmac Settlement Act did not take effect as it was never ratified by the Micmac Tribe. Two years later Congress passed the Aroostook Band of Micmacs Settlement Act (ABMSA). Section 2(a)(5) states, “It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefited from inclusion in the Maine Indian Claims Settlement Act of 1980.” The ABMSA created the Aroostook Band of Micmacs Land Acquisition Fund infused with \$900,000 within the US Treasury.

Besides specifying the compensation to be paid to the Tribes, MICA, ABMSA and MIA established a new legal relationship between the Tribes, the State of Maine and the United States defining certain powers and jurisdiction belonging to each. Though enacted with the hope of settling these questions of powers and jurisdiction, over time interpretation and implementation of certain provisions of the settlement acts have become viewed by the Tribes as oppressive and unjust. Negotiators of the original agreements have expressed concern that their implementation has deviated from the understanding reached by the parties in 1980 and 1991. In addition, MIA and the Micmac Settlement Act fail to take into account changes in the capabilities and capacities of the parties achieved over 27 years that warrant adjustments in the tribal-state relationship.

### **Deliberations and Meetings of the Tribal-State Work Group**

Few people know that the Wabanaki Tribes residing in Maine, the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Indian Nation, comprise some of the oldest continuous governments in the world. These Tribes existed for thousands of years prior to the wave of European contact that occurred in the fifteenth, sixteenth, and seventeenth centuries. Prior to European contact the Wabanaki enjoyed tremendous freedom of movement throughout what we today call Maine, routinely moving great distances according to the seasons to exploit advantageous living conditions. They lived their lives according to Tribal ancient laws, traditions, customs and practices that had passed from one generation to the next.

As Europeans populated Maine, Wabanaki lands shrunk and their freedom to move and live as they saw fit steadily diminished. Upon Maine becoming a state in 1820, the Wabanaki suffered a 160 year period in which every facet of their lives was controlled by Maine laws. The Aroostook Band of Micmacs endured an additional eleven years of Maine control over their affairs due to their later recognition in 1991. Maine published all of its laws controlling Indians in the commonly referenced blue book, *State of Maine: A Compilation of Laws Pertaining to Indians*, prepared by the now defunct Department of Indian Affairs.

Tribal representatives made clear during the Tribal-State Work Group process that the Maine Indian Claims Settlement and later the Aroostook Band of Micmacs Settlement Act were intended to end Maine control over Indian lives and restore some of the freedom that the Wabanaki previously enjoyed prior to Maine statehood. Butch Phillips stated at the August 20, 2007 meeting that the Tribes sought the protections afforded under the internal tribal matters language so they could protect the activities most important to an Indian. He explained that the Tribes wanted to avoid anyone ever again telling them what to do on their lands. In the most basic sense, the much disputed and litigated term “internal tribal matters” which appears in §6206 of MIA was intended to protect the Tribes from outside interference in how they wish to live. For the Tribal representatives, they never relinquished their inherent sovereignty derived from their creator, GheChe’Nawais.

Tribes expected the settlement acts to strengthen their governments, improve their living conditions, and help sustain themselves as unique peoples. Most importantly, the Tribes stand committed to protecting and sustaining their cultures. Congress also viewed MICSA as protection against the acculturation of the Tribes.

Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. To the contrary, the settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all internal matters. *Senator Melcher, Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829, Report Number 95, 95<sup>th</sup> Cong., 2<sup>nd</sup> Session, September 17, 1980.*

While the Tribes can cite improvements in their living conditions, the gains to date have been modest. Outside entities continue to impose their will on the Tribes using provisions of the settlement acts against the Tribes. Tribal cultures remain vulnerable to acculturation.

During the October 3 TSWG meeting, the Wabanaki presented a PowerPoint presentation (see appendix five) titled “History and Perspectives of the Wabanaki Tribes.” The presentation included history, statistical information, and a Wabanaki perspective on history too often distorted by a victor’s sensibility. Wabanaki presenters reminded the TSWG of some ugly history that included the placement of bounties on Indian lives, a deliberate program to suppress and eradicate Wabanaki languages, and the economic and political control that the Indian Agent exerted over Wabanaki people.



The presentation also stressed the inequality in living conditions experienced by the Wabanaki today. Though the Tribes can point to improvements in their living conditions since receiving federal recognition, gaping disparities in their health status, life expectancy, and standard of living exist between them and other population groups residing in Maine. Such huge disparities raise fundamental questions of social and political justice.

Wabanaki people generally live far shorter lives in poorer health with far fewer educational and economic opportunities. All four Tribes possess life expectancy averages more than 20 years less than the Maine population at large. Tribal unemployment rates range from 15% to 70% compared to neighboring populations of 5% to 8%. Maine Indian household incomes average less than \$20,000 in some areas, far under the statewide average. Indian Health Services spent on average \$2,130 per capita on medical care for Indian people in 2005 compared to a nationwide average of \$6,423. Many educational barriers exist for Wabanaki people despite the University of Maine System tuition waiver and scholarship program.

For more than two decades, a public discourse has occurred with the Tribes asserting that the implementation of MIA and the other settlement acts have diverted from their original intent. The TSWG Wabanaki representatives articulated this position during the TSWG meetings. In order to gain as balanced and complete a perspective as possible on this question of original intent, the TSWG invited John Paterson, a former Maine Deputy Attorney General and principal negotiator of MIA for the State, and Tim Woodcock, who assumed a key position on the Senate Select Committee on Indian Affairs in March 1980 shortly before the settlement was presented to Congress, to address the Work Group. Both addressed the TSWG on November 19, 2007. Near transcripts of their remarks are available courtesy of Gale Courey Toensing of Indian Country Today (see appendix six).

John Paterson confirmed an often repeated Tribal contention that the Maine Implementing Act never intended to make the Passamaquoddy Tribe or Penobscot Nation municipalities. On November 19, 2007, John Paterson stated, “The idea was not to make the Tribes municipalities like cities and towns but to use the idea of municipal powers as a way of identifying those sovereign powers which the tribe would have.” Paterson continued later by saying:

So as we talked it through in great detail – it was at this point we hired F. Paul Frinsko. He was the foremost municipal lawyer in the State of Maine. If memory serves he even sat in on some negotiations. We talked about what that meant and what the Tribes could do and we talked through the fact that the Tribes had the authority to manage their own land, run their own schools, zone their own lands, tax or not tax as they chose, exercise environmental regulations, have their own police and fire department, manage their own roads, run health clinics—in short everything a town could do without being called a town—that was the model.

Sovereignty was frequently discussed throughout the TSWG meetings. Several documents devoted to the topic of Tribal Sovereignty were shared with Work Group members.

Though not using the term, Butch Phillips articulated a Tribal understanding of sovereignty as part of an opening statement he made at the October 3, 2007 TSWG meeting (see appendix seven):

The ability to govern ourselves within our own territory free from outside interference was agreed to in 1980. The constrained interpretation that the courts have placed on the phrase “internal tribal matters” and the municipal language of the Settlement Act has supplanted this agreement and as a result the Settlement Act has not provided the opportunity for true self-determination and self-governance for the Maine Tribes.

Tim Woodcock offered a personal interpretation of Tribal Sovereignty at the November 19, 2007 TSWG meeting:

With respect to the issue of sovereignty itself, it’s a difficult issue. My own perspective on it, and I think the law supports me on this, is that tribal sovereignty is exercised by the tribes present in this gathering, predates the United States, it does not come from the United States, it does not come from the State of Maine -- - it comes from those communities as preexisting entities, communities with political dimensions.

The Penobscot Nation and Passamaquoddy Tribe developed a joint proposal to amend the Maine Implementing Act in part to address the sovereignty dispute (see appendix eight). To support their proposed changes, the Penobscot Nation distributed a document, The Tribes of Maine (see appendix nine), during the January 11, 2008 TSWG meeting capturing history and facts supporting the Tribes’ negotiating position. They proposed a change to §6206 of MIA. The two Tribes advocated striking the General Powers language under §6206(1) and replacing it with the language “shall have, exercise, and enjoy all the rights, privileges, benefits, powers and immunities of any federally-recognized sovereign tribe within their respective Indian territory relating to their respective tribal members, lands and natural resources.” The Penobscot/Passamaquoddy proposal later lists twelve proposed powers that would include but not be limited to under internal tribal matters (pp. 21-22 of the Penobscot/Passamaquoddy proposal).

State representatives on the TSWG did not support the broad changes affecting sovereignty and the related internal tribal matters and municipality clause of §6206 proposed by the Penobscots and Passamaquoddy. At the last TSWG meeting held January 11, 2008, Representative Simpson presented a proposal based on six points of agreement that had been discussed during meetings that occurred between the December 5, 2007 and January 11 TSWG meetings (see appendix 10). Doug Luckerman drafted a proposal on behalf of his clients, the Maliseets and Micmacs, that attempts to commit to statutory language the six points of agreement reached between the December and January TSWG meetings (see appendix 11 Omnibus Tribal Sovereignty Act of 2008). The State language proposed creating a new definition of internal tribal matters under the definition section found in §6203 (see appendix 12).

This new definition would expand the powers listed under the current description of internal tribal matters found in §6206.

While a considerable amount of discussion occurred concerning Passamaquoddy/Penobscot concerns with their powers of self-government under MIA §6206, Maliseet Environmental Planner Sharri Venno told those gathered at the October 3 TSWG meeting that the Maliseets' issues involved other provisions of MICSA and MIA. MICSA gave us a couple of things. One, it provided federal recognition. Two, it created the ability for the State of Maine and Maliseets to discuss jurisdictional issues. Sharri Venno believes MIA contradicts much of MICSA. She relayed an instance when a State court resolved an internal Maliseet political dispute. Sharri Venno also cited contradictions between MIA and MICSA on taxation issues applicable to the Maliseets. The problems that the Maliseets have faced are not focused on internal tribal matters but more general issues.

Time worked against the TSWG during the end of the process. Work Group members did not have sufficient time to examine, discuss, possibly adopt, and/or offer alternatives to the Penobscot/Passamaquoddy and State proposal on sovereignty and internal tribal matters. The Work Group agreed to ask Governor Baldacci's Office to create a smaller group to continue working on the sovereignty/internal tribal matters question.

Besides sovereignty, internal tribal matters, and the municipality reference in §6206 of MIA, the Tribes raised the issue of the venue where disputes involving the settlement acts are heard and resolved. From a Tribal perspective, having disputes judged in the courts of one of the parties to the dispute is inherently unfair and violates many people's sense of justice. The Tribal emphasis placed on the issue of venue mirrors the importance that MITSC gave the issue when it prepared a briefing document for the May 8, 2006 Assembly of Governors and Chiefs (see appendix 13).

**Problem Statement:** Two of the sovereigns belonging to MITSC have consistently maintained that resolving disputes between the parties in the courts of the third sovereign, the State of Maine, is inherently unjust. An alternative dispute resolution process that could be independent of the judicial system of the State of Maine ought to be evaluated.

Several different proposals for replacing State Court jurisdiction for disputes involving MIA were advanced and discussed. An earlier Passamaquoddy/Penobscot proposal suggested submitting such disputes to a United Nations Indigenous arbitrator with disputes unresolved by that entity appealable to the federal district court in the District of Columbia. After several State appointees expressed opposition to any United Nations involvement, the Passamaquoddies and Penobscots presented at the final TSWG meeting the idea of creating a special Tribal-State Court with jurisdiction over any disputes involving MIA. Under the proposal, the Tribes would appoint three judges and the State would appoint three judges to this special court. The Tribal-State Court proposal received little discussion during the final TSWG meeting.

Strong agreement emerged among TSWG appointees to strengthen the dispute resolution role originally envisioned for MITSC. Butch Phillips, a member of the Penobscot Nation negotiating team that represented the Tribe during the land claims discussions with the State, explained in an exchange with John Paterson at the November 19, 2007 TSWG meeting:

How MITSC came about. We were in disagreement on fishing rights on waters that border both the state and tribal lands and the upcoming Indian territory, the newly acquired land, and we kicked this around for quite some time. Andy Akins, who was the chairman of our negotiations committee, made the recommendation. He said let's form a commission or committee of State and Tribal people to look at these disputes on these waters and from there it expanded -- this commission would be the liaison between the Tribes and the State and they would listen to disputes and try to come up with some resolutions.

Though not reflected in the final recommendations of the TSWG, the Maliseets and Micmacs expressed a desire to expand hunting opportunities for their Tribes' members. In comparison to the Passamaquoddy Tribe and Penobscot Nation, the Maliseets and Micmacs land holdings comprise a fraction of the larger Tribes' land bases. At this time, the Maliseets and Micmacs do not control sufficient land to establish their own hunting seasons for traditionally hunted game such as moose. A joint Wabanaki proposal presented at the December 5, 2007 TSWG meeting proposed creating sustenance moose hunting rights for each Tribe. The proposed language would allow the taking of one moose per Maliseet and Micmac household, from any location where the hunting of such game is allowed, until such time as the Maliseets and Micmacs acquire trust lands sufficient to support the hunting of moose. Several questions raised about the proposal and insufficient time did not allow a full examination of the idea.

## **Recommendations**

The TSWG voted unanimously to support legislation to make several changes to Title 30 of the Maine Revised Statutes, MIA, and the Micmac Settlement Act. The proposed statutory changes include:

1. Change the heading for Title 30 from “Municipalities and Counties” to “Municipalities, Counties and Indian Tribes”
2. Amend the law to achieve jurisdictional parity for all Tribes
3. Institute mandatory mediation by MITSC for tribal-state disputes prior to going to court with deadlines and requiring all parties to act in good faith
4. Require mandatory meaningful consultation with Tribes prior to any legislative, regulatory or policy change by the State that may have an impact on the Tribes
5. MITSC to continue studying and analyzing potential changes to the Act and may make formal recommendations to the amend the Act to the Judiciary Committee every two years, or more often as it deems appropriate, with MITSC having the explicit authority to introduce such legislation
6. The Maine Tribes not be subject to the Freedom of Access laws (FOA) for any purpose. In MIA, the TSWG said this should be included under the internal tribal matters language, not the municipality status language.
7. That the statement of intent for the settlement acts specify that the documents are to be viewed as dynamic, flexible, and to be regularly revisited. In addition, that the Aroostook Band of Micmacs should be added to MITSC with a corresponding additional seat(s) for the State. Though the Maine Legislature passed a bill last year to add the Houlton Band of Maliseet Indians to MITSC, it did not become law due to the late certification of acceptance by one Tribe.

As previously stated, the TSWG passed as its final recommendation that the Executive Branch of State Government invite the Tribes to discuss unresolved issues and sovereignty.

**Appendix 1**  
**AN ACT TO**  
**IMPLEMENT THE LEGISLATIVE RECOMMENDATIONS OF**  
**THE TRIBAL-STATE WORK GROUP**

**Be it enacted by the People of the State of Maine:**

**Sec. 1. 3 MRSA §602 is amended to read:**

**§602. Designation of officer**

The governor and council of the Penobscot Nation, the Joint Tribal Council of the Passamaquoddy Tribe, ~~and~~ the council of the Houlton Band of Maliseet Indians and the Tribal Council of the Aroostook Band of Micmacs shall each designate, by name and title, the officer authorized to execute the certificate of approval of legislation required by section 601. The designation shall be in writing and filed with the Secretary of State no later than the first Wednesday in January in the First Regular Session of the Legislature, except that the designation for the ~~Houlton Band of Maliseet Indians~~ Aroostook Band of Micmacs must be filed with the Secretary of State no later than 45 days after adjournment of the Second Regular Session of the ~~112th~~ 123rd Legislature. The Secretary of State shall forthwith transmit certified copies of each designation to the Secretary of the Senate and the Clerk of the House of Representatives. The designation shall remain in effect until the governor and council of the Penobscot Nation, the Joint Tribal Council of the Passamaquoddy Tribe, ~~or~~ the council of the Houlton Band of Maliseet Indians or the Tribal Council of the Aroostook Band of Micmacs make a new designation.

**Sec. 2. 30 MRSA, first 2 lines are amended to read:**

**TITLE 30**  
**MUNICIPALITIES, ~~AND~~ COUNTIES AND INDIAN TRIBES**

**Sec. 3. 30 MRSA §6205-A is repealed.**

**Sec. 4. 30 MRSA §6206-A is repealed.**

**Sec. 5. 30 MRSA §6208-A is repealed.**

**Sec. 6. 30 MRSA §6212 is amended to read:**

## 30 § 6212. Maine Indian Tribal-State Commission

**1. Commission created.** The Maine Indian Tribal-State Commission is established. The commission consists of ~~9~~ 17 members, ~~4~~ 8 to be appointed by the Governor, subject to review by the Joint Standing Committee on Judiciary and to confirmation by the Legislature, 2 to be appointed by the Passamaquoddy Tribe, 2 to be appointed by the Penobscot Nation, ~~2 to be appointed by the Aroostook Band of Micmacs, 2 to be appointed by the Houlton Band of Maliseet Indians~~ and a chair, to be selected in accordance with subsection 2. The members of the commission, other than the chair, each serve for a term of 3 years and may be reappointed. In the event of the death, resignation or disability of a member, the appointing authority may fill the vacancy for the unexpired term.

**2. Chair.** The commission, by a majority vote of its ~~8~~ 16 members, shall select an individual who is a resident of the State to act as chair. When ~~8~~ 16 members of the commission by majority vote are unable to select a chair within 120 days of the first meeting of the commission, the Governor, after consulting with the governors of the Penobscot Nation, ~~and the Passamaquoddy Tribe, the Aroostook Band of Micmacs and the Houlton Band of Maliseets,~~ shall appoint an interim chair for a period of one year or for the period until the commission selects a chair in accordance with this section, whichever is shorter. In the event of the death, resignation or disability of the chair, the commission may select, by a majority vote of its ~~8~~ 16 remaining members, a new chair. When the commission is unable to select a chair within 120 days of the death, resignation or disability, the Governor, after consulting with the governors of the Nation, ~~and the Passamaquoddy Tribe, the Aroostook Band of Micmacs and the Houlton Band of Maliseets,~~ shall appoint an interim chair for a period of one year or for the period until the commission selects a chair in accordance with this section, whichever is shorter. The chair is a full-voting member of the commission and, except when appointed for an interim term, shall serve for 4 years.

**3. Responsibilities.** In addition to the responsibilities set forth in this Act, the commission shall continually review the effectiveness of this Act, ~~the Micmac Settlement Act (chapter 603) and the Omnibus Tribal Sovereignty Act (chapter 605), and the social, economic and legal relationship between the Passamaquoddy Tribe, and the Penobscot Nation, the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians and the State and shall make such reports~~ a report and recommendations to the Legislature, the Passamaquoddy Tribe, ~~and the Penobscot Nation, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs by January 31st of every other year, beginning in 2009, or more often as it determines appropriate. The commission may submit legislation necessary to implement its recommendations.~~

~~Seven~~ Eleven members constitute a quorum of the commission and a decision or action of the commission is not valid unless ~~5~~ 9 members vote in favor of the action or decision.

**4. Personnel, fees, expenses of commissioners.** The commission may employ personnel as it considers necessary and desirable in order to effectively discharge its duties and responsibilities. These employees are not subject to state personnel laws or rules.

The commission members are entitled to receive \$75 per day for their services and to reimbursement for reasonable expenses, including travel.

**5. Interagency cooperation.** In order to facilitate the work of the commission, all other agencies of the State shall cooperate with the commission and make available to it without charge information and data relevant to the responsibilities of the commission.

**6. Funding.** The commission may receive and accept, from any source, allocations, appropriations, loans, grants and contributions of money or other things of value to be held, used or applied to carry out this chapter, subject to the conditions upon which the loans, grants and contributions may be made, including, but not limited to, appropriations, allocations, loans, grants or gifts from a private source, federal agency or governmental subdivision of the State or its agencies. Notwithstanding Title 5, chapter 149, upon receipt of a written request from the commission, the State Controller shall pay the commission's full state allotment for each fiscal year to meet the estimated annual disbursement requirements of the commission.

**7. Mandatory, non-binding mediation.** Before the State or any of its political subdivisions may commence litigation or an administrative action involving interpretation of this Act, the Micmac Settlement Act or the Omnibus Tribal Sovereignty Act, it must submit the dispute to the commission for mediation. The commission shall mediate the dispute between the parties or shall designate a neutral third party to conduct the process. All parties to mediation before the commission or its designated neutral third party must make a good-faith effort to inform the commission and the other parties regarding the nature of the dispute and to resolve the dispute prior to commencement of litigation or administrative action. Unless the parties otherwise agree, reasonable fees and expenses incurred by the commission in connection with any mediation must be apportioned and paid in equal shares by each party. Unless the commission consents to an extension, all mediations must be commenced within 60 days, and completed within 90 days, of the commission's receipt of notice of dispute. At the conclusion of the mediation, the commission shall indicate in writing whether the parties have resolved all or parts of the dispute, and shall describe the terms of the resolution. If no resolution is reached, the commission shall indicate that fact in writing. Notwithstanding any law to the contrary, any statute of limitations applicable to the issues included in the dispute is tolled until the commission issues a written determination. The Commission may adopt rules to carry out this subsection. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter II-A.

**Sec. 7. 30 MRS §6215** is enacted to read:

**§6215. Legislative, regulatory and policy changes by the State**

Every State agency shall provide for a timely and meaningful consultation with each Indian tribe, nation or band before proposing, adopting or implementing legislation or administrative measures that may materially affect the Indian tribe, nation or band.



**Sec. 8. 30 MRSA §7204** is repealed.

**Sec. 9. 30 MRSA §7205** is repealed.

**Sec. 10. 30 MRSA §7206** is repealed.

**Sec. 11. 30 MRSA §7207** is repealed.

**Sec. 12. 30 MRSA c. 605** is enacted to read:

**CHAPTER 605**  
**OMNIBUS TRIBAL SOVEREIGNTY ACT of 2008**

**§7501. Short title**

This Act shall be known and may be cited as "The Omnibus Tribal Sovereignty Act."

**§7502. Legislative finding and declaration of policy**

The Legislature finds and declares the following.

In 1980 the State enacted the Maine Implementing Act. The Act included an agreement reached with the Passamaquoddy Indian Tribe and the Penobscot Indian Nation that settled a land claim asserted by the Indians.

State and federal courts have since interpreted the language of the Maine Implementing Act as removing the Tribal sovereignty of the Passamaquoddy Indian Tribe and the Penobscot Indian Nation. It was not the intent of the State to remove the Tribal sovereignty of these Tribal governments. While the Maine Implementing Act confers State municipal status upon the Passamaquoddy Indian Tribe and the Penobscot Indian Nation this status was intended to limit, not terminate, the Tribes' own inherent sovereign authorities.

The agreement entered into between the State and Passamaquoddy Indian Tribe and the Penobscot Indian Nation also recognizes the on-going relationship between the Passamaquoddy Indian Tribe and the Penobscot Indian Nation and the federal government and the Maine Implementing Act should not be interpreted to interfere with or terminate that trust relationship.

The Houlton Band of Maliseet Indians in 1980, and the Aroostook Band of Micmacs in 1991 also settled land claims with the State. However, while the State agreed to support federal recognition for both of these Tribes, neither Tribe was provided the same jurisdictional authority over their lands as the Passamaquoddy Indian Tribe and the Penobscot Indian Nation. The Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians have functioning governments and land in trust for the benefit of their members; it is therefore fair and just, pursuant to the authority granted by Congress in 25 USC 1725(e)(2) and Pub. L. 102–171, Stat. 1143. 6(d) to afford both of these Tribes the same jurisdictional settlement provided to the Passamaquoddy Indian Tribe and the Penobscot Indian Nation and to recognize their inherent sovereign authority.

In the 28 years since the enactment of the Maine Implementing Act the Maine Tribes have developed Tribal governments that provide a substantial range of services to thousands of Tribal members. Also during that time considerable State and Tribal resources have been expended in legal disputes over the legal status of the Maine Tribes under the settlement Acts. These disputes have caused a substantial economic and social hardship for the Maine Tribes.

This chapter represents a good faith effort on the part of legislature to re-evaluate the effectiveness of the Maine Implementing Act and the Micmac Settlement Act and provide fair and just revisions. Determining the effectiveness of the Maine Implementing Act and the Micmac Settlement Act will require continuous and on-going review. The revisions made to the Settlement Acts in this legislation should not be construed as conclusive of any rights or obligations of either the State or the Tribes.

It is the Purpose of this Act to clarify the sovereignty of the Maine Tribal governments.

### **§7203. Powers, privileges and immunities**

**1. Applicable law.** The following provisions of the Act to Implement the Maine Indian Claims Settlement (Chapter 601) apply to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmac Indians and their respective Trust Lands:

A. Title 30, section 6206;

B. Title 30, section 6207;

C. Title 30, section 6209-B;

D. Title 30, section 6210;

E. Title 30, section 6211; and

F. Title 30, section 6214

**2. Freedom of Access laws.** Title 1, chapter 13 does not apply to the Passamaquoddy Tribe, the Penobscot Nation, the Aroostook Band of Micmacs or the Houlton Band of Maliseets.

**Sec. 13. Contingent effective date.** This Act does not take effect unless, within 60 days after the adjournment of the Second Regular Session of the 123rd Legislature, the Secretary of State receives written certification from the Houlton Band Council of the Houlton Band of Maliseet Indians that the band has agreed to the provisions of this Act, written certification from the Tribal Council of the Aroostook Band of Micmacs, written certification by the Tribal Chief and the Council of the Penobscot Nation that the nation has agreed to the provisions of this Act and written certification by the Joint Tribal Council of the Passamaquoddy Tribe that the tribe has agreed to the provisions of this Act pursuant to the United States Code, Title 25, Section 1725(e)(2), copies of which must be submitted by the Secretary of State to the Secretary of the Senate, the Clerk of the House and the Revisor of Statutes, except that in no event may this Act take effect until 90 days after adjournment of the Legislature.

## SUMMARY

This bill contains statutory recommendations of the Tribal-State Work Group, established by Executive Order 19 FY 06/07 and continued and expanded by Resolve 2007, chapter 142.

This bill amends the statute that identifies the process by which the Tribes notify the Secretary of State when State legislation is approved by the respective tribal government to include the Tribal Council of the Aroostook Band of Micmacs.

This bill revises the Title of Title 30 to appropriately encompass the inclusion of laws that apply to Indian Tribes in Maine.

This bill provides for jurisdictional parity among the four Indian Tribes in Maine: The Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation, based on the powers, privileges and immunities outlines in the Act to Implement the Maine Indian Claims Settlement enacted in 1980. This bill enacts the Omnibus

Tribal Sovereignty Act, which provides a statement of legislative intent and findings, and cross-references the powers, privileges and immunities to apply to the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians. This bill repeals sections of the Implementing Act that provide different powers, privileges and immunities for the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs, or that are not consistent with federal law: section 6205-A (Acquisition of Houlton Band Trust Land), section 6206-A (Powers of the Houlton Band of Maliseet Indians), section 6208-A (Houlton Band Trust Fund).

This bill expands the membership of the Maine Indian Tribal-State Commission to include two representatives of the Aroostook Band of Micmacs and two representatives of the Houlton Band of Maliseet Indians, as well as four additional representatives of the State. It expands the duties of MITSC to include a continual review of the effectiveness of the Implementing Act the Micmac Settlement Act and the Omnibus Tribal Sovereignty Act. It authorizes MITSC to submit legislation directly to the Legislature. It also requires that before the State or any political subdivision commences a court or administrative action involving interpretation of the Implementing Act, the Micmac Settlement Act or the Omnibus Tribal Sovereignty Act, the dispute must first be presented to MITSC for mediation. The mediation provisions are based on current Civil Rules of Procedure concerning mediation.

This bill requires every State agency to provide for a timely and meaningful consultation with each Indian tribe, nation or band before proposing, adopting or implementing legislation or administrative measures that may materially affect the Indian tribe, nation or band.

This bill provides that the Freedom of Access laws do not apply to the Aroostook Band of Micmacs, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation.

This bill includes a contingent date section to provide that it does not take effect with respect to a particular Tribe unless that Tribe approves the legislation within 60 days of the adjournment of the Second Regular Session of the 123rd Legislature.

## Appendix II

### **Remarks of Paul Bisulca Briefing to the Maine Legislature on the Maine Indian Claims Settlement Act, Maine Implementing Act, Maine Indian-Tribal State Commission, and Current Tribal-State Relations January 17, 2008**

Honorable members of the Maine Senate and Maine House, good morning. My name is Paul Bisulca and I chair the Maine Indian Tribal-State Commission, which was created as part of the Maine Indian Land Claims Settlement in 1980. We refer to this commission as MITSC.

With me today are Paul Thibeault, an attorney with Pine Tree Legal Assistance, and John Dieffenbacher-Krall, executive director of MITSC. For the next forty-five minutes the three of us will explain to you what MITSC is, provide you with a brief overview of the 1980 Settlement between Maine and the Penobscot, Passamaquoddy and Maliseet Tribes, the 1991 Settlement for the Aroostook Band of Micmacs, and explain why we are here today talking about MITSC and the 1980 and 1991 Settlements.

First, let me introduce to you the MITSC Commissioners: for the State of Maine, Greg Cunningham, attorney for Bernstein, Shur, Sawyer & Nelson in Portland; Mike Hastings, Director of Research and Sponsored Programs for the University of Maine; Paul Jacques, Deputy Commissioner, Inland Fisheries and Wildlife; and James Nimon, Director, Office of Business Development, Department of Economic and Community Development. Tribal representatives include Hilda Lewis from Pleasant Point; Donald Soctomah, Passamaquoddy Tribal Representative representing Indian Township; John Banks, Director of Natural Resources for the Penobscot Nation; Bonnie Newsom, Tribal Historic Preservation Officer, Penobscot Nation; Linda Raymond, Maliseet Tribal Council Member; and Brian Reynolds, Maliseet Education Director and Tribal Council Member.

Nineteen-eighty marked the culmination, through settlement, of an Indian land claim in Maine brought by the Passamaquoddy Tribe, the Penobscot Indian Nation, and the Maliseet Band of Indians. This land claim was characterized by the U.S. Justice Department as “*potentially the most complex litigation ever brought in the Federal courts with social and economic impacts without precedence and incredible litigation costs to all parties.*” (US Senate Select Committee Report, p.157) It was not expected that the settlement of this land claim would exist without problems. In the words of Governor Joe Brennan, “*I do not think anybody can boldly assert that this was the perfect resolution. I think it is a reasonable one, but where there are consequences that may not have been contemplated, I think they have to go back and be resolved.*” (US Senate Select Committee Report pp. 142-143) Recognizing that there would likely be post-Settlement disagreements, MITSC was created, according to Butch Phillips, Penobscot negotiator, “*to be the liaison between the tribes and the state, listen to disputes and try to come up with resolutions*”. (Butch Phillips, Nov 19, 2007 Tribal-State Work Group meeting) Lead negotiator for the State, John Paterson, agreed, “*I think the goal was to have a forum in which issues could be aired.*” (John Paterson, Nov 19, 2007 Tribal-State Work Group meeting)

The Maine Indian Tribal-State Commission (MITSC) was created by Maine's Act to Implement the Maine Indian Claims Settlement not as a state agency but as an intergovernmental entity to monitor the creation of a new jurisdictional relationship between the State and those Tribes within the boundaries of Maine and to address the unintended consequences about which Governor Brennan spoke. Accordingly, it was charged with continually reviewing the effectiveness of the Maine Implementing Act and the social, economic and legal relationship between the State and the Passamaquoddy Tribe, the Penobscot Nation and the Maliseet Band of Indians, which last year was included within MITSC. In discharging its responsibilities MITSC does not strictly interpret the law as a court would do but concerns itself more with the overall intent of the Settlement and the formulation of policy recommendations that lead to better relations.

MITSC's other responsibilities are to:

- promulgate fishing rules and regulations for waters over which it has jurisdiction
- make recommendations about fish and wildlife management policies on non-Indian lands to protect fish and wildlife stocks on lands and waters subject to regulation by the Tribes or MITSC
- make recommendations about the acquisition of certain lands to be included in Indian Territory
- review petitions by the Tribes for designation as an extended reservation

In addition to those responsibilities established in the Settlement Act, MITSC assumed some of the duties that once fell to the Maine Department of Indian Affairs, which was eliminated with the Settlement. We now respond to numerous public inquiries and staff various state initiatives, and we do that with a part-time executive director and a volunteer chair and commissioners. MITSC is also expected to provide a certain liaison function between the State and the non-MITSC tribe, the Micmac.

To understand how MITSC is expected to fulfill its responsibilities, I give you two quotes from the 1980 hearing before the U.S. Senate Select Committee on Indian Affairs. Maine Attorney General Dick Cohen, *"I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine."* (US Senate Select Committee Report, p. 164) Tom Tureen, attorney for the Passamaquoddies and Penobscots, *"It was the State's view that the destiny of the Maine tribes as much as possible in the future should be worked out between the State and the tribes."* (US Senate Select Committee Report, p 181-182)

Accordingly, MITSC was structured to have equal numbers of State and Tribal representatives sitting around a conference table as equals continually reviewing the effectiveness of the settlement, addressing what may be unintended consequences and working out future destinies.

Despite the best efforts of some very capable people, MITSC, unfortunately, never effectively played a role in guiding from a State perspective Indian policy in Maine in the last twenty plus years, and the same could be said from the Indian perspective regarding State policy. The result has been what I believe was avoidable litigation and tension between the Tribes and the State of Maine. In 2003, the tribes in frustration left MITSC for a 14-month period with the chair and executive director subsequently leaving. John and I came to MITSC near the end of 2005 with the resolve to make MITSC politically relevant and to win back those constituents who had lost confidence in MITSC.

Presently, a Tribal-State Work Group, formed by this legislature is at work addressing problems that are now affecting tribal-state relations. John will discuss the Work Group in his portion of the orientation.

His orientation will offer our consensus-based understandings and views, based on many years of experience dealing with tribal-state relations, relations that originally were in some areas vaguely defined and relations that are now maturing with a need for a different way to look at them. The objective for us is to strive for a relationship that is guided not by the courts but by deliberate public policy with the interest of all citizens in mind. This approach, we believe, is more productive and less wasteful of all parties' resources.

Paul Thibeault will now provide an overview of the Settlement Act. He will be followed by John Dieffenbacher-Krall who will address what we have done to improve the way MITSC functions and what MITSC is doing that should be of interest to you: why we are here talking about MITSC and the 1980 Settlement.

**Remarks of Paul Thibeault  
Briefing of the Maine Legislature on the  
Maine Indian Claims Settlement Act, Maine Implementing Act, Maine Indian-Tribal State  
Commission, and the Current Tribal-State Relations  
January 17, 2008**

I will give you an overview of the 1980 Maine Indian claims settlement concerning the Penobscot Nation, Passamaquoddy Tribe, and the Houlton Band of Maliseets, as well as the 1991 settlement for the Aroostook Band of Micmacs. I will describe the legal/political relationship that existed between the tribes, the state and the federal government before the settlements, and the major provisions of the settlements, including the unusual jurisdictional structure that was created.

But first I want to disclose the viewpoint from which I look at the settlements. I am an attorney in the Native American Unit of Pine Tree Legal Assistance. I have never been a lawyer for Indian tribes, tribal officials or the state. As a Legal Services attorney and Public Defender working in Indian Country in Maine, Minnesota and North Dakota I have represented Indian people living in poverty. It has been my experience that when tribal and state governments become bogged down in jurisdictional disputes, the people who suffer the most are not the governmental leaders or

bureaucrats, and certainly not the lawyers. It is Indians living in poverty, neglected citizens of both their tribes and the state, who suffer most from the inefficiency of government services and lack of economic development.

Second, it is often said that the relationship between the State of Maine and the Indian Tribes within its borders is unique. However, in the context of federal Indian law many tribes have unique relationships with the federal government and the states. These differences are the historical result of treaties, executive orders, special statutes, local court decisions, and various other local factors. With more than 560 federally recognized tribes in this country, it might fairly be said that local variations in inter-governmental relationships are the norm rather than the exception. That having been said, I do not believe that the Maine settlements have lived up to either their advance billing or their dynamic potential to create a flexible, effective relationship between the tribes and the state. Whatever view one has on particular issues, I think it is fair to say that none of the parties could have predicted that the 1980 settlement would remain essentially unmodified for all these years; that so many issues would be submitted to the courts instead of being worked out between the parties; or that the courts would interpret jurisdictional language in the particular ways that they have.

### **Historical Background**

The historical relationship between the federal government and the Indian tribes situated within the boundaries of Maine and the other original colonies of New England has been very different from the relationship between the federal government and “western” tribes. The latter relationship was federalized in nature as the central government of the United States established direct relationships with “frontier” tribes through treaties and executive agreements. By contrast, the federal government had few direct dealings with the tribes in Maine and did not extend formal recognition to those tribes. The State of Maine actively regulated the affairs of Indians within its borders for almost 160 years, creating hundreds of laws relating to Indians. As a result, when the Maine tribes asserted land claims in the 1970’s, they first had to overcome the claim by the state that they were not really bona fide Indian tribes at all.

The decision in the Morton case in 1975 led to the enactment of several eastern land claims settlement acts including the Maine Indian Claims Settlement Act (MICSA). All of these settlements were based on a central principle of federal Indian law: that only the federal government has the authority to convey or extinguish tribal rights to aboriginal land or to restrict the historical sovereign powers of Indian tribes.

In the years immediately preceding the 1980 settlement the Maine tribes had won a string of important court decisions that established that, notwithstanding the long period of time during which the State of Maine had treated them as “State Indians”, their historical sovereignty had never been legally diminished. The decision in the Morton case led the U.S. Department of the Interior to extend federal recognition to the Passamaquoddy Tribe before the settlement. The Maine Supreme Judicial Court decision in State v. Dana held that the state lacked criminal jurisdiction over crimes by tribal members on tribal lands. The federal court opinion in



Bottomley v. Passamaquoddy Tribe revealed that the Maine tribes retained the full attributes of sovereignty as defined by federal Indian Law rather than any reduced type of tribal sovereignty watered down by local Maine history. In short, if there had been no settlements, and no other Congressional action limiting tribal authority, today the tribes in Maine would possess and exercise the full degree of sovereignty that we usually associate with “western” tribes. Under the jurisdictional provisions of the settlement, the state was able to regain some of the control that it had exercised before the court decisions cast doubt on the legal basis for such state control. But that extension of authority to the state could happen only because Congress approved it.

### **Basic Principles of Federal Indian Law**

What are the basic concepts of federal Indian law that provided the legal context in which the critical court cases were decided in the 1970’s and the Maine settlements were enacted? It starts with the recognition of tribes as governments that have a unique place within our constitutional framework. What is recognized is that the tribe as a political and legal entity (not merely an ethnic or cultural minority group) has a direct and special government-to-government relationship with the United States. A central component of that relationship is the federal trust responsibility that obligates the federal government to protect tribal resources and act in the best interests of tribes and their members.

After the American Revolution, Indian tribes became subject to the legislative power of the U.S. and their external powers of sovereignty were terminated (e.g. the power to enter into treaties with foreign nations). However, internal sovereignty (e.g. powers of local self-government over tribal territory) survived unless expressly limited by treaty or federal legislation, or implicitly limited by the nature of the tribes’ domestic dependent status. Thus, the Maine settlements could not and did not create the sovereign powers of the tribes. The settlements modify those powers, but are not their historical or legal source.

Tribes and states sometimes have concurrent jurisdiction. Which sovereign will exercise jurisdiction in a particular context may be determined by judicial principles of comity that are based on mutual respect between co-sovereigns, or by tribal-state compacts negotiated on a government to government basis in an atmosphere of good faith and common interests.

Judicial Canons of Construction in Federal Indian Law- The U.S. Supreme Court has fashioned special rules of construction, including that ambiguities in statutes enacted for Indians’ benefit are resolved in Indians’ favor. However, in interpreting the specific Maine settlement legislation the state and federal courts have not consistently found the Indian law canons of construction to be applicable or determinative.

### **Maine Indian Claims Settlements - Basic Elements**

The Maine Indian Land Claims Settlement of 1980 consisted of two basic elements:

Federal Component- Maine Indian Claims Settlement Act-25 U.S.C. §§ 1721 et seq. (MICSA)- Enacted by Congress, extinguishing the land claims, compensating the Indians for their claim, and ratifying the Maine Implementing Act.

State Component- Maine Implementing Act- 30 M.R.S.A. §§ 6201 et seq. (MIA)- An agreement between the State and the Indian Tribes that was enacted by the Maine Legislature. This specifies the laws that are applicable to Indians and Indian lands in Maine.

The Passamaquoddy Tribe, Penobscot Nation, and the Houlton Band of Maliseets received \$81.5 million from federal funds, the largest settlement of its kind and the first to include provisions for the reacquisition of land.

### **Federal and State Recognition**

The Maliseets obtained federal recognition and the Penobscot Nation and Passamaquoddy Tribe continued to be recognized, while creating a new jurisdictional relationship with the State. The tribes and their members became eligible for federal benefits and programs, including housing, health care, education and resource protection.

### **Repeal of State Laws**

The terms of the settlement allowed the State to repeal most of the state laws specifically relating to the tribes. The Maine Department of Indian Affairs, which acted as an advocate and liaison with other state agencies, was abolished.

### **Disposition of Land Claims**

MICSA ratified all land transactions in which any Maine Indians lost their lands by treating such transfers of land as though they were done in accordance with the laws of the United States. This had the effect of extinguishing all other Indian land claims in Maine.

### **Tribal Acquisition of Land**

Of the \$81.5 million provided under the settlement, \$54.5 million was established as a Land Acquisition Fund: \$26.8 million each for the Penobscot Nation and the Passamaquoddy Tribe and \$900,000 for the Houlton Band of Maliseets.

The first 150,000 acres of land acquired by the Passamaquoddy Tribe and the first 150,000 acres acquired by the Penobscot Nation are eligible for inclusion as part of their respective territories and are held in trust by the United States for the benefit of the tribes.

### **Trust Funds**

A Settlement Fund of \$27 million was established: \$13.5 million each for the Penobscot Nation and the Passamaquoddy Tribe to be held in trust by the U.S. government. Interest from \$1 million for each tribe is designated for the benefit of tribal elders. No trust fund of that kind was established for the Houlton Band of Maliseets.

### **Tribal-State Commission**

The settlement established the Maine Indian Tribal-State Commission, the role and structure of which Paul and John are describing today.

## **Jurisdictional Issues**

Federal laws concerning Indians apply in Maine unless they are contrary to settlement terms. One of the unusual terms in MICSA that has become controversial because of what the tribes see as unintended negative consequences is the proviso that any federal law enacted after the date of the 1980 settlement for the benefit of Indians which would materially affect or preempt the application of the laws of the state shall not apply in the State of Maine, unless specifically made applicable within Maine by Congress.

The federal act, i.e. MICSA, states that the Maine tribes, their members, and lands or natural resources owned by them or held in trust for them shall be subject to state jurisdiction to the extent provided in the Maine Implementing Act. In turn, section 6204 of the Implementing Act states that:

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

The following areas of jurisdiction are spelled out in the 1980 settlement in relation to the Penobscot Nation and the Passamaquoddy Tribe:

- The tribes may adopt constitutions consistent with the settlement.
- The tribes may assume exclusive jurisdiction over Indian child custody proceedings pursuant to The Indian Child Welfare Act.
- The tribes may sue and be sued, but retain limited sovereign immunity.
- The tribes may operate their own courts with exclusive jurisdiction over misdemeanors, minor juvenile offenses, minor civil disputes, divorce, and child custody matters for their members. The Tribe and Nation are required to apply the State of Maine's definitions of criminal offenses and applicable punishments.
- The tribes may make the rules for hunting and trapping in their Indian territories and for fishing on any pond that is entirely within the territory and is less than 10 acres in area.
- The Penobscot Nation and Passamaquoddy Tribe are required to make payments in lieu of taxes, but Indian lands cannot be taken under the state tax laws. Pursuant to the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986 land purchased by the federal government in trust for the Houlton Band is exempt from taxes, but the Band is required to make payments in lieu of taxes. For that purpose the Secretary of the Interior manages the Houlton Band Tax Fund.

-Control over internal tribal matters and municipal powers. Section 6206(1) of the Maine Implementing Act. This language is not applicable to the Houlton Band of Maliseets; and no similar provision is included in the Aroostook Band of Micmacs settlement. Section 6206(1) states as follows:

***Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.***

Soon after the 1980 settlement a fundamental disagreement emerged between tribal and non-tribal parties concerning the “internal tribal matters” and “municipality” language, resulting in ongoing litigation, including cases that are currently pending. Parties on all sides of the issue maintain that properly defining the scope of the “internal tribal matters” language is critical to the workability of the new inter-governmental relationships established in 1980.

Most recently, on August 8, 2007 the First Circuit Court of Appeals decided State of Maine v. Johnson. That case involved a decision by the Environmental Protection Agency (EPA) which gave the State of Maine permitting authority, under the Clean Water Act and MICSA, with regard to discharge of pollutants into territorial waters of the tribes, but exempted two tribal-owned facilities from the State's permitting program. Despite a detailed Opinion Letter from the Department of the Interior supporting the tribes' claims, the court upheld the State's authority to regulate all of the disputed sites, including the two sites owned by the Penobscot Nation and situated on tribal land which the EPA had found to have insignificant consequences for non-members of the Nation. With respect to the “internal tribal matters” exemption from state regulatory authority, the court stated that discharging pollutants into navigable waters is not of the same character as those things which were intended to be shielded from state authority such as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property. Significantly, the court held that the issue at hand was not even a close call and therefore did not require consideration of the balancing tests and factors that the First Circuit had previously applied in the Akins and Fellencer cases.

### **Built-In Flexibility**

The 1980 settlement was intended to create new, on-going relationships and to respond to changing circumstances. The express language of MICSA anticipated and consented in advance to future amendments to the Maine Implementing Act by agreement concerning the allocation of jurisdiction, including concurrent jurisdiction. This provision was added to MICSA at the request of the Secretary of the Interior who explained the amendment's purpose as follows:

*Based on the understanding which State and tribal officials now have, we fully expect that this relationship will prove to be a workable one. Furthermore, our proposed amendment to the bill would give Congress' consent to future jurisdictional agreements between the State and the Tribes. Thus, there is flexibility built into this relationship.*

The language that was added to MICSA to allow for future flexibility was as follows:

*The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: Provided, That such amendment is made with the agreement of the affected Tribe or Nation, and that such amendment relates to (A) the enforcement or application of civil, criminal or regulatory laws of the Passamaquoddy Tribe, the Penobscot nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the Tribe or Nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the Tribe or Nation; or (C) the allocation of jurisdiction between tribal courts and State courts.*

#### **The Aroostook Band of Micmacs Settlement**

The 1980 settlement legislation did not specifically refer to the Aroostook Band of Micmacs. Nevertheless, the Band subsequently produced documentation to support their own claim which resulted in the passage of the state Micmac Settlement Act in 1989, 30 M.R.S.A. § 7201-7207. That statute by its terms was to become effective only if the Tribal Council certified its approval within 60 days of the Legislature's adjournment and if corresponding federal legislation ratifying the state statute was subsequently enacted by Congress. The state legislation would have accorded the Aroostook Band generally the same treatment as the Maliseets under the 1980 settlement. However, the Tribal Council never certified its approval of the state Micmac Settlement Act.

Nevertheless, all of the parties apparently treated the state Act as having been enacted and in 1991 Congress approved the Aroostook Band of Micmacs Settlement Act (ABMSA) which included a finding that the Micmacs should be accorded the same settlement as the one earlier provided to the Maliseets, and stated that one of its purposes was to "ratify the state Micmac Settlement Act which defines the relationship between the State of Maine and the Aroostook Band of Micmacs." ABMSA also granted federal recognition to the Micmacs and provided a land acquisition fund of \$900,000.

Unlike MICSA, ABMSA itself does not contain any direct language concerning the applicability of state law to the Micmacs. It does not repeat the language on that topic from either MICSA or the state Micmac Settlement Act. As a result, in the context of complaints to the Maine Human Rights Commission by former tribal employees, the Band has contended that because the state Micmac Settlement Act was not certified the Band is not subject to state law. Aroostook Band of Micmacs v. Ryan. In April of 2007 the First Circuit Court of Appeals held that the non-

certification of the state Micmac Settlement Act was immaterial because the general language in §1725(a) of MICSA about the applicability of state law to Indian tribes made the Aroostook Band of Micmacs subject to state law. The court also held that ABMSA was not in conflict with and did not implicitly repeal §1725(a) of MICSA as to the Micmacs. The Micmacs sought review in the U.S. Supreme Court on the grounds, among others, that the First Circuit's decision violated basic principles of federal Indian law, but the Supreme Court declined to hear the case.

### **Remarks of John Dieffenbacher-Krall**

#### **Briefing of the Maine Legislature on How the Maine Indian Tribal-State Commission (MITSC) Increased Its Effectiveness, How Its Enhanced Effectiveness Benefits Tribal-State Relations, and Some of the Biggest Challenges Looming in Tribal-State Relations January 17, 2008**

As Paul Bisulca stated in his opening remarks, I will address how MITSC achieved a dramatic increase in its effectiveness over two years, how that enhanced effectiveness benefits tribal-state relations, and identify some of the biggest challenges looming in tribal-state relations that should most concern the Maine Legislature.

### **MITSC Turnaround**

I became MITSC Executive Director September 6, 2005. MITSC was in a weak organizational condition when I assumed the Executive Director position. It had last held an official meeting on November 6, 2003, two days after Maine voters rejected a joint Passamaquoddy/Penobscot casino for Sanford. At that November 6 MITSC meeting, the Passamaquoddy representatives told their fellow Commissioners that they had been instructed by their Tribal Governments to make a statement announcing their withdrawal from MITSC. The Penobscot representatives, in solidarity with their fellow Wabanaki, also withdrew from the meeting.

Besides the fact that MITSC had not held an official meeting for almost two years, it had no chair when I assumed the executive director position. Cushman Anthony, a former member of the Maine House, resigned in December 2004 before the conclusion of his second term. MITSC had also operated without an executive director since the August 2004 resignation of Diana Scully. To her considerable credit, Diana continued to work part-time for MITSC while holding another full-time job to deal with certain administrative functions. Though MITSC had some money because it had operated at a very minimal level for two years, its future funding prospects did not appear promising. In addition to these internal challenges, a bill had been introduced to abolish MITSC and reconstitute it in the hopes of making it more effective.

Though many indicators suggested MITSC was ready to die in September 2005, a little less than two and a half years later any informed observer of MITSC would agree it has never been more effective or politically relevant. In fact, this Legislature asked MITSC last June to staff the Tribal-State Work Group which will report to you in three days about possible changes to the Maine Implementing Act and Micmac Settlement Act that could greatly enhance tribal-state relations.

Last January I identified during MITSC's address in the House Chambers ten principal reasons MITSC had not been effective. I want to report to you on what MITSC has done to change those factors that had been hindering its effectiveness.

### **1. MITSC Has Not Been Viewed By All Of the Parties To The Settlement Act As A Forum To Settle Disputes Despite The Intent Of The Act**

MITSC has enhanced its credibility as a forum for dispute resolution. We achieved a major breakthrough with the Atlantic Salmon Management Cooperative Agreement. This is an agreement first signed by Maine, the US Fish and Wildlife Service, and NOAA Fisheries in 1998 to delineate how the State and Federal natural resource agencies would collaborate to restore Atlantic salmon within the State of Maine. The agreement expired in 2003. An impasse had developed over inclusion of the Federal Agencies' trust responsibility to the Tribes within the language of the agreement. MITSC Commissioner John Banks, who also serves as the Penobscot Nation's Natural Resources Director, asked us to become involved to see if we could resolve the issue.

We devoted several MITSC meetings to the issue. MITSC consulted with Pat Keliher from the Atlantic Salmon Commission (now Director, Bureau of Sea Run Fisheries and Habitat, Maine Department of Marine Resources), Attorney General Steve Rowe and his assistants, and the Federal natural resource agency staff working on Atlantic salmon recovery in Maine. MITSC achieved resolution of the issue by having the Federal Agencies issue a letter to the Tribes affirming their trust responsibility in exchange for the Tribes agreeing to drop the trust responsibility language in the agreement. This dispute would not have been resolved without MITSC's persistent intervention.

The Tribal-State Work Group, both its initial configuration under Governor Baldacci's executive order and current construction under your legislative resolve, represents a huge diplomatic and political breakthrough. For decades, the State of Maine had refused to discuss the intensifying dissatisfaction of the Maliseets, Passamaquoddy Tribe, and Penobscot Nation with how the Maine Implementing Act had been implemented and interpreted. MITSC insisted that the most disputed provisions of the Maine Implementing Act, internal tribal matters and the municipality language found in section 6206, get discussed at the 2006 Assembly of Governors and Chiefs. At that Assembly, Governor Baldacci and Tribal Leaders agreed to create the Tribal-State Work Group. This legislative session will determine the fate of the Tribal-State Work Group recommendations. But MITSC believes convincing the State to discuss what has most bothered the Tribes about their government-to-government relationship represents real progress.

Last spring both the Maine Attorney General and some representatives of the Aroostook Band of Micmacs asked MITSC to explore becoming involved in resolving an internal political dispute within the Tribe. To have these parties often opposed to each other both approach MITSC is more evidence of the rising confidence in MITSC to serve as a credible, fair and effective mediator.

## **2. Parties To The Settlement Act Have Bypassed MITSC When Disputes Have Arisen And Gone Directly To Court, A Route All Of The Parties Say They Want To Avoid**

MITSC now attempts to prevent parties from resorting to litigation by promoting early discussion and resolution of disputes through government-to-government communication. MITSC will employ all of the diplomatic means available to promote discussion and resolution of issues instead of confrontation and litigation.

## **3. MITSC Has Not Done Enough To Ensure Its Decisions And Findings Are Implemented**

During much of its history, MITSC has made many well thought out recommendations, some the product of many months or even years of deliberation and work, only to have them ignored by the signatories to the Settlement Act. MITSC has consciously focused during the last two years on ensuring the implementation of its recommendations.

The new approach begins with MITSC's acceptance that it has a responsibility to use all its resources and connections to implement its recommendations. If something is recommended, MITSC is prepared to do more than initially presenting the recommendation to the appropriate party or parties. MITSC now strives to focus on how to implement its recommendations instead of complaining about being ignored.

When necessary, MITSC builds alliances within and outside the signatory governments to advance its agenda. MITSC also takes into account public opinion and shaping it through effective use of the media. MITSC undertakes extensive networking and keeps a broad range of individuals and interests informed about its work.

An example of this new approach is our successful work to convince the Town of Stockton Springs to comply with not just the letter but the spirit of Maine's offensive place names law. The law prohibits the use of the words nigger, squaw, or squa in geographic place names. In the late summer of 2006, an article was published in the Bangor Daily News reporting that the Piscataquis County Commissioners had written a letter to Governor Baldacci seeking an exemption from the State law in part due to its unequal enforcement. The article caused MITSC to examine compliance with the law. Stockton Springs was the last community that persisted using the word squaw and then squa for three geographic place names within the community.

MITSC effectively used the press and its connections with NGOs, especially Maine People's Alliance, to exert pressure on the town's leaders. We met with the Stockton Springs Selectpeople on October 16 with the Maine Human Rights Commission serving as a facilitator and convinced them to work more amicably with their Indian neighbors. It worked.

## **4. MITSC Has Limited Authority, Mostly Advisory, Especially On The Key Questions Of Implementing Act Language Responsible For Much Of The Litigation Connected To The Act**



Despite limited authority we have found ways to have a greater advisory role with the respective governments. We don't have statutory authority but we do have diplomatic influence. We find all six governments increasingly turn to MITSC with a variety of communication, etiquette, diplomatic, information and policy needs.

## 5. MITSC Is Provided Insufficient Funding To Fulfill Its Responsibilities

MITSC applauds this body and Governor Baldacci for heeding our concern about insufficient funding. You decisively addressed this issue by more than doubling the State's contribution to MITSC operations for both fiscal years 08 and 09. MITSC can now function far more effectively knowing it has secure funding until June 30, 2009. Though the original Maine Implementing Act required Maine to fund all MITSC operations, the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation voluntarily support MITSC operations.

## 6. The Parties Failed To Build On The Good Will Engendered From The Negotiation Process

The lost opportunity to continue to improve tribal-state relations after President Carter signed the Maine Indian Claims Settlement Act on October 10, 1980 was recently underscored by the principal State negotiator, former Maine Deputy Attorney General John Paterson. John Paterson told the Tribal-State Work Group on November 19, 2007,

“Fortunately in late 1976 – early 1977- two important things happened. The Tribes much to their everlasting credit announced and made it quite clear that their intention was only to seek money not to seek the return of land. It was less clear as to how they felt about state land but it was certainly in respect to privately owned land they indicated they were not interested in throwing anybody off their land. That was an extraordinary gesture in view of the enormous leverage they had by virtue of the existence of that claim and I think we’re all forever indebted to them for that act of statesmanship.”

Paterson also stated on November 19,

“I must say, however, that even through those most difficult times the tenor of the discussions was extraordinarily civil. And I know for the Tribes that this was a matter of great emotion and I did then and I do now again give them extraordinary credit for the decency with which they approached those negotiations.”

Why has the tribal-state relationship generally deteriorated instead of steadily improved during the last 25 years? The answer is the failure to address unresolved and emerging disputes dealing with jurisdiction and governmental powers between the signatories. When discussions took place in early 2005 on how to restore a functioning MITSC, Tribal representatives to those discussions clearly stated unless these fundamental underlying jurisdictional issues were addressed the relationship was destined for continued friction and confrontation.

Governor Baldacci created a political opening to change that dynamic by consenting at the 2006 Assembly of Governors and Chiefs to discussing the governmental relationship questions most severely bothering the Tribes. This body has built on that opportunity by passing LD 1263, a resolve that transformed the Tribal-State Work Group from an executive branch entity to a legislative creation. MITSC considers the fact that the issues the Tribes want to discuss are at least being considered in the Tribal-State Work Group a diplomatic victory. However, the good will created by the Tribal-State Work Group will quickly dissipate if some substantive changes sought by the Tribes are not made to the Maine Implementing Act and Micmac Settlement Act.

## **7. Maine Has Not Developed An Indian Policy Or Other Supporting Policies Guiding Interactions With The Tribes Outside Of The Settlement Act**

Governor Baldacci said at the May 8, 2006 Assembly of Governors and Chiefs, “We have a Settlement Act that arrived due to the need to settle a lawsuit that *De facto* has become the Native American policy for the State.” For 27 plus years the Maine Implementing Act has defined and dictated the relationship between the State of Maine and the Tribes in ways the negotiators may have never intended. The Maine Implementing Act is a legal framework but not a substitute for a healthy government-to-government relationship.

All three branches of Maine Government should consider adoption of a formal policy to govern its relations and interactions with the Tribes. Models exist and MITSC can help with the development of appropriate policy for the Maine-Wabanaki relationship.

## **8. Parties To The Settlement Act, Especially The State, Have Failed To Recognize The Benefits Of A More Harmonious, Productive Relationship**

Governor Baldacci and all five Wabanaki Leaders have expressed their personal desire and commitment to improving the tribal-state relationship. MITSC has observed conscious efforts by Governor Baldacci and the Tribal Leaders to exercise restraint in their public statements to avoid inflaming the other parties. MITSC has encouraged this rhetorical restraint on all sides.

Tribal-state relations could make a quantum leap forward if the economic development assets of the Tribes were better supported by the State. Maine economic development specialists have offered encouragement and some tangible support to the Tribes. But what has been tried to date has not worked. The Tribes have mostly criticism for State economic development efforts intended to assist them.

Maine and the Tribes need to break out of this pattern of tentative gestures by the State that fail and replace this experience of failure with economic development success. The two final items on my list of ten things hindering tribal-state relations are key to state-tribal economic collaboration.

## **9. State Of Maine Policy Makers And People Fail To Recognize Or Choose To Ignore The Tribes' Unique Cultures, Histories, Languages, Traditions, and Governments, Hindering Tribal-State Relations**

No doubt commonalities exist in sound economic development principles whether one is attempting to improve a corporation's, cooperative's, sole-proprietorship's, town's, state's, country's, or Indian Nation's economic performance. Yet there are unique aspects of Tribal economic development that must be understood if true assistance is to be made available to the Wabanaki. The Harvard Project on American Indian Economic Development finds that sovereignty, institutions, culture, and leadership are fundamental to Tribal economic development success. Maine's economic development assistance must be geared specifically to the Tribes and what they require for success.

## **10. Intent, Goals, Prioritization, Commitment**

This room is filled with successful people. When you reflect on the successes that you have achieved, the four words I mentioned above may have helped you get to where you are today. If there is no intent on the part of the State and Tribes to enjoy better tribal-state relations, it will not happen. I have already told you that Governor Baldacci and the five Wabanaki Leaders have repeatedly expressed this intention. Senate President Edmonds, Senate Minority Leader Weston, and House Speaker Cummings have also expressed similar sentiments to MITSC in meetings we have held with them during the last year.

You have an existing forum for mutual goal setting, the Annual Assembly of Governors and Chiefs, which grew out of a recommendation made by a special task force commissioned by the 117<sup>th</sup> Maine Legislature. MITSC organizes that event for the State and the Tribes. The 2008 event will happen sometime this spring or summer.

I know you have many, many demands competing for your time. For tribal-state relations to improve, it must be a priority for all involved. The decision by many of you to visit Indian Island yesterday demonstrated the importance you ascribe to the relationship. I know Speaker Cummings and his staff are working on a multi-day legislative trip to all five Tribal communities to be possibly held later this year. I encourage you to continue to prioritize this relationship and take advantage of all opportunities to learn more about each other.

If the commitment to a more just, harmonious, mutually beneficial relationship is genuine and strong, relations will improve. Commitment sustains an individual and/or institution during periods of stress and adversity. The Tribes and the State of Maine must recognize there will be periods, though they should be relatively short, when the respective governments may have higher short-term priorities. But with a genuine commitment to tribal-state relations, the work will always resume with a fervor and urgency that it deserves.

## **Appendix III**

### **Testimony to the Joint Standing Committee on Marine Resources On**

### **LD 1957, An Act to Restore Diadromous Fish in the St. Croix River March 3, 2008**

Senator Damon, Representative Percy, members of the Marine Resources Committee, I am Paul Bisulca, Chair of the Maine Indian Tribal-State Commission, and I am here to speak in support of LD 1957.

The Maine Indian Tribal-State Commission (MITSC) is an inter-governmental entity created to continually review the effectiveness of the Act to Implement the Maine Indian Claims Settlement. One of the commission's responsibilities is to make recommendations to the Legislature with respect to implementation of fish and wildlife management policies on non-Indian lands in order to protect fish and wildlife stocks on lands and waters subject to regulation by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or the Commission. In developing our own fishing regulations the commission considers among other things the sustenance needs of the tribes, their need for economic independence and the ecological interrelationship between the regulated fishery and the other fisheries.

The Commission reviewed the Maine Rivers', November 2006, "Two Reports on Alewives in the St. Croix River" and held a question and answer session with Tom Squires, Department of Marine Resources.

It is the commission's general view that barring a native fish species from its natural spawning territory without good scientific justification is unwarranted wherever it may take place. In the case of the St. Croix River, we are aware of the economic importance of the present bass sport fishery and agree that there should be consideration of this fishery prior to any decision on this bill, but it should not be the sole consideration. We are convinced after our review of the data contained in the Maine Rivers' reports and after speaking at great length with Mr. Squires that allowing Alewife passage at the Woodland and Grand Falls dams will unlikely have any appreciable impact on the current bass fishery in those waters subject to this bill. It is our understanding from our discussion with Mr. Squires that the reintroduction of Alewives into waters in which they have for two decades been banned will be monitored. We, therefore, are satisfied from our discussion with him that any unforeseen impact caused by the Alewife reintroduction on the bass or any other fish species resident to these waters will be detected. This monitoring, we believe, is a reasonable safeguard, and in our opinion, reasonably addresses the concern of those who worry that the reintroduction of Alewives will depress the bass fishery. Accordingly, we support this bill.

Thank you.

## **Appendix IV**

**Testimony of John Dieffenbacher-Krall, Executive Director,  
Maine Indian Tribal-State Commission (MITSC),  
Concerning LD 2221,  
An Act To Implement the Recommendations of the Tribal-State Work Group (TSWG)  
March 11, 2008**

Senator Hobbins, Representative Simpson, and distinguished members of the Joint Standing Committee on Judiciary, my name is John Dieffenbacher-Krall. I live in Hudson, Maine and work on a contractor basis as the Executive Director of the Maine Indian Tribal-State Commission. I also served as the staffperson for the Tribal-State Work Group created by Resolve 2007, Chapter 142, of the 123<sup>rd</sup> Maine Legislature, Resolve, To Continue the Tribal-State Work Group.

Today I formally present to you the report that I wrote on behalf of the TSWG, the *Final Report of the Tribal-State Work Group*. I apologize for not being with you on day one of the public hearing but the weather, road conditions, and knowledge that the public hearing would be recessed until today led me to delay my testimony until now. Many if not all of you have already received an electronic version of this report. It is also available on the MITSC website at [www.mitsc.org](http://www.mitsc.org).

I listened to day one of the public hearing via the State Legislative Website. Senator Mitchell stressed the earnest listening that took place during the five TSWG sessions and the respect demonstrated by all TSWG members to each other at all times. I concur with the Senator's assessment and believe that the TSWG representatives admirably represented their respective governments and MITSC.

The TSWG made eight recommendations to this Legislature, each one formulated in the form of a motion with unanimous support from all TSWG representatives in attendance. You can read them listed in the Executive Summary found on page i with a justification for each one found on pages two to six of the report. I also encourage the Committee members to carefully review the "Deliberations and Meetings of the Tribal-State Work Group" section of the report that begins on page seven.

This section includes some of the important fact-finding conducted by the TSWG. Myths debunked by the TSWG include the ideas that the Settlement Act negotiators intended the Maine Implementing Act (MIA) "to be cast in stone" and the notion that MIA transformed the Passamaquoddy Tribe and Penobscot Nation into municipalities. Hopefully, anyone who ever again attempts to advance these arguments to this body will receive a cold reception.

The Deliberations section of the narrative also refers to a PowerPoint presentation made by the Wabanaki to the TSWG at the October 3, 2007 meeting. The actual PowerPoint presentation appears in Appendix 5 of the Report. The TSWG members strongly supported the inclusion of the entire PowerPoint presentation in their final report. I urge the Committee

members when you have an opportunity to review it because it contains startling information that should shock any person. In order to illustrate some of the great discrepancies in Wabanaki living standards compared to the Maine population at large, I read from page eight of the report:

All four Tribes possess life expectancy averages more than 20 years less than the Maine population at large. Tribal unemployment rates range from 15% to 70% compared to neighboring populations of 5% to 8%. Maine Indian household incomes average less than \$20,000 in some areas, far under the statewide average. Indian Health Services spent on average \$2,130 per capita on medical care for Indian people in 2005 compared to a nationwide average of \$6,423.

I suggest that the Committee members may wish to keep this information in mind as you deliberate over LD 2221. The Maine Indian Claims Settlement Act and Maine Implementing Act passed with the expectation that the quality of life for the Maliseets, Passamaquoddy, and Penobscots would improve. Though real and tangible improvements have been achieved, I doubt any member of this Committee or citizens of the State of Maine feel comfortable with the continuing gulf in living standards. The Harvard Project on American Indian Economic Development finds a close correlation between tribal sovereignty and economic development success with the Tribes that exercise greater powers of self-government having greater economic success as compared to those constrained by restrictions.

Some opponents to the bill have suggested that the TSWG process was not as inclusive as would have been desirable. I issued news releases for all five meetings. The TSWG received print, radio, and TV coverage from regional, statewide, and national media sources. I maintain an interested parties email list numbering nearly 100 individuals, including Mr. Manahan who testified last Wednesday, who received notification of every TSWG meeting and the final agenda for each meeting. The last three TSWG meetings were held in either the State House or Cross Office Building to enable people who could not travel to the meetings to listen to them. Every reasonable effort was made to inform people about this process and encourage their participation.

While the Tribal-State Work Group employed a number of methods to promote awareness of its work, some Aroostook County towns were not fully aware of the potential ramifications of the Work Group's recommendations. MITSC has encouraged the Houlton Band of Maliseet Indians and the Towns of Houlton, Littleton, and Monticello to discuss their concerns. The lawyer for the towns and the attorney for the Tribes have spoken twice during this past weekend. Chief Commander met with representatives from the Towns of Littleton and Houlton yesterday. A joint meeting of the three Towns, Houlton Band of Maliseet Indians, their lawyers, and MITSC is planned. I am confident as people share concerns and educate one another that everyone will feel comfortable moving forward with LD 2221.

## Appendix V

December 18, 2007

Penobscot River Restoration Trust  
P.O. Box 5695  
Augusta, ME 04332

RE: Maine Indian Tribal-State Commission comments on scoping process for the Penobscot River Restoration Project and the publication, *Penobscot River Restoration Trust Scoping Document for the Veazie, Great Works and Howland Projects (FERC Project Nos. 2403, 2312 & 2721)*

Dear Laura:

Please enter these comments submitted by the Maine Indian Tribal-State Commission (MITSC) into the official record for the public scoping process conducted by the Penobscot River Restoration Trust for the Veazie, Great Works, and Howland Projects. MITSC is an intergovernmental body created under the Maine Implementing Act (MIA – Title 30 Section 6201 et. seq.) to “continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe and the Penobscot Nation and the State.”

MITSC officially supports the Penobscot River Restoration Project as previously stated in our May 5, 2006 letter to you. MITSC views the Federal natural resource agency involvement in this project as an appropriate exercise of their federal trust responsibility to the Penobscot Indian Nation (PIN). In addition, MITSC considers the State of Maine natural resource agency support as upholding Maine’s responsibility to protect the sustenance fishing rights of PIN under the Maine Implementing Act. Under §6207 (4) of MIA, members of PIN (and the Passamaquoddy Tribe) “may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.”

MITSC perceives the intent and spirit of this provision to mean that the State of Maine has a responsibility to ensure PIN members have a reasonable opportunity to exercise their sustenance fishing rights. Toxic contaminants, principally dioxin and mercury, limit the amount of resident fish Penobscot Nation members can safely eat with some vulnerable population groups, namely women of child-bearing age and young children, advised to avoid all consumption. Restoring sustainable runs of sea-run fish species, which generally contain lower contaminant levels, would create an opportunity for more Penobscot Nation members to utilize their sustenance fishing rights as progress continues to reduce contaminants in resident fish species.

Not only does the state of Penobscot River fisheries diminish PIN members' sustenance fishing right guaranteed by the MIA, but it also threatens the cultural inheritance of the Penobscot People. The Penobscot Nation views the Penobscot River as part of its collective identity. For thousands of years, the Penobscot People have safeguarded the Penobscot River and all its creatures. The extirpation of any species from the Penobscot River harms not only the River but also the Penobscot People. Scientists agree that the main stem dams that the PRRP proposes to remove have blocked the movement of sea-run fish from reaching hundreds of miles of their ancestral habitat.

The Penobscot River Restoration Project represents one of the most dramatic and promising projects ever proposed to restore sea-run fish species to their ancestral range thus providing the Penobscot Nation with a reasonable opportunity to exercise its statutory recognized and inherent fishing rights. MITSC especially supports the PRRP's goal to "Renew opportunities for PIN to exercise sustenance fishing rights." We encourage the PRRT to maintain achievement of this goal as one of the project's most important objectives.

For healthier Penobscot River fisheries,

John Dieffenbacher-Krall  
Executive Director



## **Appendix VI**

### **Wabanaki-Bates-Bowdoin-Colby Collaborative 2007-2008 Report Summary**

The historic meeting in the spring of 2007 between the Wabanaki tribal chiefs and the college presidents resulted in an agreement to develop a program that encourages Wabanaki students to attend college and enhances their knowledge about Bates, Bowdoin, and Colby Colleges in particular. A summary of the efforts of the first year of this collaboration is presented here. The working group that included over 50 tribal and college members divided their efforts to focus on three key areas discussed below. A great amount of progress was made during this first year and all are committed to building on the program during the 2008-2009 academic year.

#### **Group A: Early College Awareness**

The goal of this program was to encourage late elementary and junior high students to attend college. During their respective spring breaks, each college sent a team of their students to visit schools attended by Wabanaki youth to present the opportunities (and fun) that college offers. Games, short movies, and illustrations were used to create interest. The results of the school visits were positive, with at least 145 Wabanaki children involved in the program. Teacher responses were also positive. A special tee-shirt and bookmark were designed and given to each participant. Improvements for the coming year include earlier and more extensive dialogues with the staff at the tribal schools, a revised schedule to avoid conflicts with school breaks and MEA exams, and the inclusion of a session that involves parents and community members.

#### **Group B: Summer Aspirations Program**

The aim of this program was to encourage high school students to make college matriculation a goal. Nine students and four tribal chaperones visited the colleges in June, with an overnight stay at each campus. Workshops and tours offered during the day included an introduction to life at a small liberal arts college, an explanation of the admissions process, and participation in a simulated class. The college visits were successful in engaging the tribal students. These visits were conducted as a pilot program. A goal for 2008-09 is to involve more students and tribal school staff. The ideas proposed for the future include targeting a younger age group, preferably the 8<sup>th</sup> grade when students are planning for high school. In addition, another program would focus on the needs of high school students engaged in the college application process.

#### **Group C: Campus Climate**

The key objective of this committee was to determine how each of the three colleges could improve the social, academic, and administrative climate of each campus to promote the educational success for Native Americans, especially the Wabanaki students. The goals of this committee were larger in scope than the other committees, with a variety of options discussed. These options were grouped in three areas.

1. Utilizing resource personnel who can offer academic and cultural programs
2. Providing counseling and advising specialists who are sensitive to the unique cultural experiences of Native students
3. Sponsoring events that expose the full college community to Wabanaki culture

During the past year all the colleges made efforts to offer speakers, musical events, as well as arts and crafts shows which highlighted Wabanaki culture.

These recommendations will require further consultation and funding to implement, with each campus developing an appropriate response in the years to come.

## **Appendix VII**

### **Report**

#### **Sweat Lodge Ceremony at Maine State Prison September 27, 2008**

##### **Background**

Throughout the 2006 and 2007 Legislative Sessions, the Sipayik Criminal Justice Commission worked with Tribal Representative Donald Soctomah and the Maine Indian Tribal State Commission to submit and move legislation that would assure that Native prisoners have full access to Traditional Ceremony while in prison. Originally, this legislation was specific to Wabanaki People in State of Maine. With the support of Tribal Leaders and MITSC many meetings were held with the DOC to draft policies that would insure religious freedom, not only for Native People, but for all people who are imprisoned in Maine.

Eventually a law was passed that guaranteed religious freedom and mandated the promulgation of policy to assure that all prisoners had access to their spiritual and cultural traditions and ceremonies.

One requirement of the Procedures that were agreed upon called for the creation of a Tribal Advisory Group representative of the 5 Wabanaki Communities in Maine to guide the DOC on Traditional Wabanaki Ceremonies. In May this group was assembled:

Arnie Neptune: Penobscot  
Newell Lewey: Maliseet  
Brian Altvater: Passamaquoddy Pleasant Point  
Stephanie Bailey: Passamaquoddy Indian Township  
Richard Silliboy: Mi'qmak

Denise Altvater: Chair  
Jamie Bissonette: Staff  
Paul Thibeault: Advisor

##### **Preparation**

The Tribal Advisory Group met with the Department of Corrections two times in preparation for the Sweat Lodge Ceremonies throughout the prison system. It was agreed that the Lodge at Warren would be the first lodge and that the procedures developed there would become a template for the Ceremonies to be held at all other prisons.

The agreements reached included:

- Spiritual Leaders and Pipe Carriers could bring tobacco into the prison if it was necessary for Ceremony. The Spiritual Leader would be responsible for bringing any unused tobacco out side of the prison.
- All bundles would need to be inspected by prison security. The Spiritual Leader would open the bundle and handle any objects that prison personnel needed to inspect.
- The Lodges constructed would remain in place for the customary 4-year period of time.
- The prison would set aside a Ceremonial site that would be away from regular prison traffic. To the extent possible, the prisoners themselves would be responsible for the upkeep of the area.
- The Ceremonies are open to all prisoners who are actively following Native Traditional Practices.
- Two pre-requisites for participation in the Sweat Lodge Ceremony are regular participation in Native Religious Programming and participation in an orientation session offered before the Lodge was to take place.
- The prison would provide feast food that would be prepared according to tradition.
- To the extent possible, the prisoners would be responsible for the construction of the Lodge and the clean up afterwards.
- There would be no more than 12 men in a Lodge at a given time.
- To accommodate all of the Native prisoners it was agreed we would do two Sweat Lodge Ceremonies.
- It was agreed that the prisoners from Protective Custody would come in for one round after the second Lodge was completed.
- In the future there would be two Lodges for General Population and one for those in Protective Custody.
- The DOC would contract with David Gehue to pay for his travel expenses and honorarium to do the orientation for the Ceremonies and the first Sweat Lodge Ceremony. Brian Altvater would do the second. Newell Lewey would assist both.
- The *Practical Guidelines for Administration of Inmate Religious Beliefs and Practices: Native American (Section A) Dated 3/27/2002* were offered as a reference.
- The responsibilities for the materials used to construct the Lodge and hold the Ceremonies were divided as follows:

The prison's responsibilities:

1. Wood for fire
2. Kindling
3. Water for drinking
4. 32 Blankets to cover the Lodge
5. 4 Plastic Tarps to cover the Lodge
6. 3 Canvas Tarps to cover the Lodge
7. Feast Food
8. Iron Bar for digging holes
9. Shovel (Spade type) and Rake
10. Pitchfork for moving rocks
11. Saw to cut the poles

Tribal Advisory Group's responsibilities:

1. 16 poles for the Lodge

2. Rocks for the Ceremony
3. Medicines necessary for the Ceremony (Sweet Grass, Sage and Tobacco)
4. Splasher
5. Rattles and Bells
6. Hand drum
7. Cedar for the floor of the Lodge
8. Ropes to tie the poles
9. Pipe and smudge bowl
10. 2 5-Gallon containers of spring water for the Ceremony
11. Deer Antlers to move the rocks.
12. Birch Bark to start the fire
13. 8 mats to place on the wet ground inside the Lodge

## **Ceremony**

In July, Jamie Bissonette met with Deputy Warden O'Farrell and Captain Rackliffe to select a site for the Sweat Lodge. The Deputy Warden had preselected a site that was perfect for the Ceremony. This step by the Maine State Prison to choose a pleasing and respectful site set the tone for all the preparations leading up to the Ceremony.

Brian Altvater assembled all of the items necessary for the two Sweat Lodge Ceremonies. Brian Altvater and Jamie Bissonette arrived at the prison at 10:30 a.m. on September 26<sup>th</sup> to transfer all items from Brian's truck to a prison vehicle. Richard Silliboy joined at 11:00 a.m. The prison staff was ready and waiting when we arrived at the prison. CO's Mesurvey and Anderson accompanied Captain Rackliffe and Deputy Warden Leida Dardis. The atmosphere was friendly, cooperative and welcoming. Since a tropical storm was expected, it was decided that we would construct the Lodge immediately and do the orientation for the prisoners at 2:00 p.m.

Brian and Jamie met with Leida Dardis to choose 5 inmates to assist with building the lodge. They were:

Jeremy Stevens  
Chris Francis  
Daniel Mitchell  
Guy Larkin  
Richard Bender

All of these men worked diligently to build the Lodge and ready the site for the Sweat Lodge Ceremony. This was very hard work because the site was on top of ledge and there was between 6 and 8 inches of soil and stones before you reached the ledge itself. The Lodge constructed is a Wabanaki Medicine Lodge with 16 poles.

David Gehue arrived at the prison at 12:00 and worked with Brian Altvater to guide the men in the construction of the Lodge. At 2:00 p.m., David Gehue and Jamie Bissonette went in to begin the orientation of the prisoners. David Gehue did an excellent job teaching about the Sweat Lodge Ceremony and the life-style commitments that one had to make to live a Traditional Life. The orientation and question and answer period lasted until 4:30 p.m. Brian Altvater joined part way through and added teachings from his perspective. This orientation was thorough and thoughtful. David and Brian did a wonderful job.

All of the prisoners who assisted with the construction of the Lodge requested that they sweat in the second Ceremony with Brian Altvater. This left Jeremy Stevens free to keep the fire for the first Sweat Lodge Ceremony. Chris kept the fire for the second Lodge and stayed to help with the clean up after the Ceremony.

We began at 5:30 a.m. on Saturday morning. Brian Altvater, Richard Silliboy, Newell Lewey, Jamie Bissonette, and David Gehue were met by Captain Rackliffe, Deputy Warden Leida Dardis, Chaplain Walter Foster, and CO's DeGuisto and Littlefield. The fire was lit at 6:00 a.m. and the first group of prisoners were ready to enter the Lodge at 8:30 a.m. David Gehue kept this Lodge. 8 men participated. The second Lodge began at 11:00 a.m. Brian Altvater kept this lodge. 10 men participated. After the second Lodge, three men came over from Protective Custody to participate in one round. Brian Altvater kept this round. The men from PC made a special request for full participation in January and we will do our best to accommodate this request. We finished at the prison by 1:00 p.m. and left the prisoners to collect and burn the cedar and clean up the site.

After each Lodge the kitchen staff provided pears and apples along with juice, whole wheat bread, turkey and cheese to make sandwiches with. Jamie Bissonette prepared this feast food with assistance from Deputy Warden Leida Dardis. A Spirit Plate was assembled after each Lodge and after the PC prisoner's round. This was taken out of the prison and offered by Brian Altvater.

Because this was the first time we had held Ceremonies at the prison and we were trying to accommodate three groups of prisoners, there had to be changes in the schedule as we went along. These changes are often difficult in a maximum-security setting. Captain Rackliffe and Deputy Warden Leida Dardis worked very hard to make things work and demonstrated amazing flexibility.

## **Acknowledgements**

A special acknowledgement needs to be given to Brian Altvater who did all of the preparation for the Lodges. He gathered all the poles and all of the rocks spending much of the previous week

making sure that all of the connections were made so that Saturday could proceed in an organized manner.

Deputy Warden Leida Dardis and Captain Rackliffe created a comfortable and cooperative atmosphere so that the Ceremonies could take place in an organized and respectful way. Captain Rackliffe purchased a canvas gazebo to protect supporters from the wind and rain. All of the officers who were working security were very respectful with all bundles and medicines. This went a long way in making this historic occasion go very smoothly. The kitchen staff made sure that the food that was sent out for feast food, although simple, was of good quality and prepared carefully. The staff at the Maine State Prison has set a standard of cooperative work across cultural barriers that could be emulated in other prisons and jails. We are deeply appreciative of their work.

David Gehue traveled from Shubenacadie NS to prepare the prisoners for the Sweat Lodge Ceremony. He set a tone of discipline and deliberate commitment. He also made it clear that with responsible behavior, forgiveness was possible. He explained that it was very serious to undertake this kind of commitment but that the benefits would be large. David Gehue stressed that from this day forward they would have a clean slate if they committed to leading their lives in a sacred and honorable manner. He also stressed that the best way to say that you are sorry is to never do it again.

Newell Lewey assisted both David Gehue and Brian Altvater doing 9 rounds in the three lodges. He also sang for each group.

Jamie Bissonette and Richard Silliboy provided necessary logistical support, prepared the feast food and worked with prison staff to make sure that the day went smoothly.

Ultimately, we need to give thanks to Denise Altvater for her dedicated leadership in this whole project. Through her commitment to respectful communication, she made hard conversations possible and good resolutions into solid commitments.